IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN HUGHES, Petitioner, v. JEFFREY BEARD, et al., Respondents.	: : : : : : :	CIVIL ACTION NO. 06-250

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE April 30, 2012

Presently before the Court is the counseled petition for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitioner, Kevin Hughes, who is presently lodged at S.C.I.–Waymart, is serving a life sentence for first-degree murder and other offenses. By his petition, he challenges his 1981 state court convictions on grounds that he received ineffective assistance of counsel and that his due process rights were violated in various respects. Many of his grounds for relief relate to his mental status, both at the time of the crimes charged and at critical times in the trial process. Much of our focus here concerns the assistance of counsel in connection with the assertion of mental capacity defenses, which was explored in great depth at an evidentiary hearing held before me. We have determined that Hughes has not demonstrated that he was deprived of any federal constitutional right as to any claims that were not reasonably adjudicated by the state court. In addition, we have found that the state court did not unreasonably apply any Supreme Court precedents when it rejected Hughes's remaining federal constitutional claims on their merits. Accordingly, and as more fully set forth below, we **RECOMMEND** that the petition be **DENIED**.

I. PROCEDURAL HISTORY[1]

Following a lengthy jury trial in the Philadelphia County Court of Common Pleas, Hughes was convicted on March 23, 1981 of the March 1, 1979 rape and murder of nine-year-old Rochelle Graham. He was four days shy of his 17th birthday when these offenses were committed. On October 27, 1983, the Honorable Robert A. Latrone sentenced him to death on the first-degree murder conviction and to two concurrent sentences of ten to twenty years for rape and involuntary deviate sexual intercourse, to run consecutive to the death sentence. The Pennsylvania Supreme Court affirmed his conviction on direct appeal. *See Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989) ("*Hughes-I*"). (Pet. ¶¶ 8-12; Ans. at 5.)

On or about June 12, 1996, appointed counsel filed a petition under the Pennsylvania Post-

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[1] Our preparation of this Report and Recommendation involved a review of Petitioner's counseled Petition for Writ of Habeas Corpus by a Prisoner in State Custody ("Pet.") filed on January 18, 2006 (Doc. No. 1); the District Attorney's Response to Petition for Writ of Habeas Corpus ("Ans."), with appended exhibits, filed on August 11, 2006 (Doc. No. 14); and the state court record received from the Clerk of Quarter Sessions of Philadelphia. The parties assisted in supplementing the state court record, providing us copies of the notes of testimony from March 1980 (the transfer hearing), January and February 1981 (described as suppression hearings but also including the competency assessment), and February and March 1981 (trial); Hughes's counseled briefs to the Pennsylvania Supreme Court on direct appeal and PCRA review; and the counseled PCRA petition and appended affidavits that Hughes incorporates by reference into his federal petition.

We note that, although counsel indicated in the Petition that "Petitioner intend[ed] to follow with a memorandum of law within 60 days," (Pet. at 1 n.1), he did not do so. The 49-page counseled petition does, however, contain extensive citations to the record, includes at least some citations to legal authorities in support of the propositions contained in the Petition, and is organized in the manner of a legal brief with a procedural and factual overview followed by claims for relief under several headings and sub-headings.

The Court received additional and more extensive briefs from the parties (Doc. Nos. 105, 106, 109) following the evidentiary hearing that was held in February of 2010 (Doc. Nos. 99-104) relating to the particular claim of trial counsel's alleged ineffectiveness in failing to present an insanity and/or diminished capacity defense. Several hundred pages of documents were also marked as exhibits at the evidentiary hearing and provided to the Court.

Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 ("PCRA"). Subsequently appointed counsel, from the Center for Legal Education, Advocacy & Defense Assistance, now affiliated with the Capital Habeas Unit of the Federal Community Defender's Office, substantially amended the petition. On April 4, 2001, the Honorable C. Darnell Jones, II, to whom the petition was transferred following the death of Judge Latrone, dismissed the petition without holding an evidentiary hearing. In a lengthy opinion filed on December 21, 2004, the Pennsylvania Supreme Court affirmed in large part the dismissal of the PCRA petition but remanded the case for an evidentiary hearing on a particular claim of ineffective assistance of counsel relating to the sentencing phase. *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004) ("*Hughes-II*").

Before a hearing was held, the United States Supreme Court announced in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Eighth Amendment prohibits the execution of persons who were under age 18 at the time of the offense for which they were convicted. Hughes amended his PCRA petition to add a *Roper* claim. The PCRA Court granted relief on March 21, 2005, vacating the death sentence and imposing a sentence of life imprisonment without the possibility of parole for the murder conviction. As the death sentence had already been lifted, Judge Jones determined that the remand hearing ordered by the state supreme court as to penalty phase issues had become moot. (Pet. ¶¶ 13-22; Ans. at 5-6.) *See also Hughes-II*, 865 A.2d at 774-75.

Hughes initiated the present action on January 18, 2006, raising four issues pertaining to the evaluation of his competency to stand trial, trial counsel's failure to present mental state defenses, his adjudication in the criminal court rather than in the juvenile court system, and the jury instructions given in the guilt phase of his trial. Following upon a review of the pleadings and state court record before us, as well as the Philadelphia District Attorney's Office's response to his

petition, on April 5, 2007 we ordered that an evidentiary hearing be held on the questions of: (1) the alleged ineffectiveness of counsel in failing to request a hearing regarding Hughes's competency at the time of a particular pre-trial proceeding, and (2) the alleged ineffectiveness of counsel in failing to investigate, develop, and present an insanity and/or diminished capacity defense at trial. (Doc. No. 19.) Respondents objected to this order and briefing ensued. (Doc. Nos. 20, 22, 28, 33.) In a Memorandum and Order dated September 25, 2007, the late Honorable Marvin Katz sustained Respondents' objection to the grant of an evidentiary hearing relating to the performance of counsel in failing to request that Hughes's competency be established prior to the March 10, 1980 hearing at which the defense sought transfer of the case to the court's juvenile division. The district court permitted the evidentiary hearing to go forward, however, on the claim of ineffectiveness for failure to present an insanity and/or diminished capacity defense at trial. (Doc. No. 34.)[2]

In advance of the evidentiary hearing, the parties engaged in extensive discovery relating to the question of Hughes's possible insanity or diminished capacity at the time of the offense in 1979. An evidentiary hearing was ultimately held before me on February 16, 17, 19, 22, 23 and 24, 2010, limited to the claim that trial counsel was ineffective for failing to investigate, develop, and present a mental state defense at the 1981 trial.[3] (Doc. Nos. 99-104.) The matter is now ripe for review.

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[2] As is discussed in greater detail below, Judge Katz disagreed with the state court that Hughes's trial testimony barred the presentation of all mental health defenses and reasoned that Hughes might not have testified at trial or might not have testified as he did if counsel had reasonably investigated the availability of the mental state defenses. (Doc. No. 34 at 18-23.)

[3] The evidentiary hearing was continued several times beginning in November 2008 at the request of Petitioner's counsel due to deteriorations in Petitioner's mental health that required specialized treatment and rendered him unable to participate in a hearing. *See, e.g.,* Doc. Nos. 75-85. Post-hearing briefing continued through August 20, 2010.

II. FACTUAL BACKGROUND

Nine-year-old Rochelle Graham was found dead on March 1, 1979 in an abandoned house in Philadelphia to which authorities had responded to put out a fire. She had been strangled to death and also bore injuries to her vagina and rectum that were consistent with penile penetration or attempted penetration. She was found with her pants and panties removed, and parts of her body were badly burned from a pillow and pieces of cardboard that had been placed on her body and ignited. The letters "PEA" had been burned into the ceiling of the room in which she was found. (Pet. ¶¶ 23-25; Ans. at 2-3.)

Ten months later, on January 5, 1980, 12-year-old M.O. ("Maria") reported that she had been sexually assaulted and choked to a state of unconsciousness by a young man whom she knew of and had seen a short time earlier. The attack occurred in another vacant house, not far from that in which Graham was found. Maria picked out her attacker from a photo array and told police that he was known as "Peanut." She had identified Hughes, who was then 17 years old. After obtaining a warrant, Philadelphia police officers arrested Petitioner at his home on January 11, 1980, where they observed the word "PEANUT" burned into the ceiling of his bedroom. (Pet. ¶¶ 26-28; Ans. at 4.)

Upon questioning by the police, Hughes gave a full confession to the sexual assault of Maria. Given the similarities between the nature of the assaults on Maria and Rochelle Graham, and given that both occurred in close proximity to each other and to Hughes's home, police then questioned him regarding the Graham murder. In two interrogations, both before and after police obtained an arrest warrant relative to the Graham murder but after an initial denial, Hughes confessed to the Graham offenses. (Pet. ¶¶ 29-30; Ans. at 4.) *See also Hughes-II*, 865 A.2d at 771.

Given Hughes's age, the charges arising from the assault on Maria were initially brought in

the juvenile division of the state court. Because the Graham case involved a murder charge, however, that case was assigned to the adult criminal division of the Court of Common Pleas. While the Commonwealth moved for the transfer of the Maria case to the adult court, Hughes moved for the transfer of the Graham case to the juvenile court. Following a hearing held on March 10 and March 11, 1980, the court denied the transfer request. (Pet. ¶ 39.) *See Hughes-II*, 865 A.2d at 771. Hughes was represented in those proceedings by Mead Spurio, Esquire, who had been retained by Hughes's family upon his arrest but who later withdrew his appearance.

Nino V. Tinari, Esquire, was appointed to represent Hughes in the criminal court proceedings of the Graham case on January 23, 1980. Based on difficulties he experienced attempting to interact with Hughes following his transfer from the Youth Study Center to an adult criminal facility, the court arranged for Hughes to be examined to determine his competency to stand trial. (*See* N.T. 1/28/81 at 8-9.) In a report dated April 17, 1980, Edwin Camiel, M.D., a psychiatrist affiliated with the court's probation department, recommended that Hughes be transferred to a psychiatric facility for further evaluation and the formulation of a treatment plan to improve his emotional health and restore his competency. (Pet. ¶ 41; N.T. 1/28/81 at 9-10.) *See also Hughes-II*, 854 A.2d at 771-72. A psychiatrist assigned to the prison, Arthur Boxer, M.D., also concluded on April 30, 1980 that Hughes was incompetent and strongly recommended a transfer to the state mental hospital that was then located in Philadelphia. (Pet. ¶ 42; N.T. 1/28/81 at 11-13.) The state court calendar judge obliged and ordered Hughes's transfer to a state hospital on May 6, 1980. (Pet. ¶ 43; N.T. 1/28/81 at 10.) *See also Hughes-II*, 865 A.2d at 771. In an evaluation conducted on July 10, 1980, psychiatrist Dr. Gino Grosso noted some stabilization with medication but found Hughes to have disorganized thinking and speech. (Pet. ¶ 44; N.T. 1/28/81 at 11-13.) On August 28 and October

9, 1980, however, William Levy, M.D., reported to the Court of Common Pleas that he and two of his state hospital colleagues believed Hughes competent to be tried. (*See* N.T. 1/28/81 at 13-14.) Dr. Levy testified at a competency hearing convened on October 21, 1980, after which the Honorable Berel Caesar concluded that Hughes was competent to stand trial. (Ans. at 21-22; N.T. 1/28/81 at 15.)

At the calling of his case for trial on January 28, 1981 before Judge Latrone, Attorney Tinari asked that his client's competency be evaluated anew. Judge Latrone arranged for Hughes to be evaluated again by Dr. Camiel of the court's probation department, who was called to testify the next day. In response to Dr. Camiel's testimony that Hughes was competent, Hughes was given leave to retain a psychiatrist, Robert Blumberg, D.O., who examined him and testified that Hughes was not competent. Judge Latrone ordered a third assessment be performed by a clinical psychiatrist affiliated with the Court of Common Pleas, Richard B. Saul, M.D., who opined that Hughes was competent. Following consideration of these reports and his own observations of Hughes in court, Judge Latrone declared him competent to stand trial. At the Commonwealth's request, and to ensure continued competency, the court ordered prison officials to continue to administer to Hughes the Thorazine medication that had stabilized him during his period of pre-trial hospitalization and incarceration. (Pet. ¶¶ 46-49, 51; Ans. at 22-23; N.T. 1/28/81 & 1/29/81.) *See also Hughes-II*, 865 A.2d at 771-72.

By February 13, 1981, the court had resolved all outstanding pre-trial motions. Jury selection began on February 17 and the jury was sworn on February 26. The Commonwealth's case focused upon Hughes's confessions and the circumstantial evidence linking him to the crimes, particularly: the fact that the letters "PEA" were burned into the ceiling at the scene of the Graham murder and

that the word "PEANUT" — which was Hughes's nickname — was burned into the ceiling of his bedroom; the substantial similarity in the assaults on Maria and Rochelle Graham; and the fact that the route Hughes took to school provided him with an opportunity to have committed both offenses. *See Hughes-II*, 865 A.2d at 772. The defense case, which began on March 13, 1981, sought to undermine the reliability of the confession given by Hughes to police by showing that Hughes was unable to read and write and lacked the intellectual capacity to articulate the details of the crimes described in the statements. The defense also introduced evidence that Hughes attended school on the day of the Graham murder. Finally, Hughes testified in his own defense, contesting the admissions made to the detectives and asserting his innocence in the Graham assault and murder. *Id.* The prosecution then presented rebuttal evidence concerning the circumstances of Hughes's confessions and the fact that he told a court psychologist in January 1980 that he had set a fire in an old house on March 1, 1979. *Id.* On March 23, 1981, the jury returned its guilty verdict.

Hughes's petition describes the post-conviction documentation of his poor mental condition, which has led to several involuntary commitments to state hospitals both while he was on death row and since the reduction of his death sentence to a sentence of life without parole. (Pet. ¶¶ 54-68.)

III. LEGAL STANDARDS

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"), 28 U.S.C. § 2254 sets out several limitations on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) makes clear that a federal court shall entertain only those applications alleging that the person is in state custody "in violation of the Constitution or laws or treaties of the United States." Apart from certain exceptions set out in the statute, Sections 2254(b) and (c) provide that the court may not great habeas

relief unless the applicant has exhausted state remedies. Finally, Section 2254(d) provides that habeas relief "shall not be granted" with respect to a claim that was "adjudicated on the merits in State proceedings" unless the petitioner shows, as discussed further below, that the state court decided the case contrary to Supreme Court law at the time of the decision, unreasonably applied such law, or unreasonably determined the facts in light of the record at the time of the decision. *See generally Cullen v. Pinholster*, 563 U.S. ---, 131 S. Ct. 1388, 1398 (2011); *Greene v. Fisher*, No. 10-637, --- U.S. —, 132 S. Ct. 38, 42 (2011). *See also Harrington v. Richter*, 562 U.S. ---, 131 S. Ct. 770, 773-74 (2011) (noting that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)").

Petitioner has pled that each of the four broad claims for relief asserted in his petition were properly presented to the state court in the PCRA proceedings and that to the extent that the state court ruled on the merits of each claim, he satisfied § 2254(d)(1) or (d)(2). (*See* Pet. ¶¶ 148, 150, 154, 156, 161, 163, 169, 171 (asserting state court's rulings either were contrary to a decision of the United States Supreme Court, reflected an unreasonable application of a standard set by the United States Supreme Court, "and/or" were based upon an unreasonable determination of facts).) To the extent that any claims were procedurally defaulted, he contends that the state rule upon which the claim was adjudicated was not an adequate bar to federal review and/or that he can establish a basis to excuse the default. (*See* Pet. ¶¶ 149, 155, 162, 170.)

Respondents do not challenge the timeliness of the petition, and it does appear that it satisfies the requirements of 28 U.S.C. § 2244(d)(1). Rather, they contend that the claims Hughes asserts in his petition are either procedurally defaulted or fail on the merits under the deferential standard of review required by 28 U.S.C. § 2254(d). We briefly discuss the standards implicated by

those assertions and then discuss the issues raised by Hughes's petition on a claim-by-claim basis.

A. Exhaustion of state remedies, procedural default

Out of a sense of comity and federalism, federal court habeas relief for persons in state custody is available only for claims where the petitioner has exhausted the corrective processes that are available in the state court system to protect the rights of convicted persons. *See* 28 U.S.C. § 2254(b)(1). In order to satisfy this obligation to exhaust and to give the state courts a full and fair opportunity to resolve a federal constitutional claim, the state prisoner must "fairly present" his claims in "one complete round of the state's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "Fairly presenting" a federal claim to the state courts requires the petitioner to present both the factual and legal substance of the claim in such a manner that the state court is on notice that the federal claim is being asserted. *See McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

A petitioner may default his federal habeas claim due to defects in the manner in which he presented it to the state court. A claim is considered defaulted if the state court denied relief based upon a state procedural rule that was independent of the merits of the federal question presented and adequate to support the denial of relief, e.g., one that was consistently and regularly applied at the time the procedural default occurred. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991); *Harris v. Reed*, 489 U.S. 255, 260 (1983).

A procedurally defaulted claim cannot provide a basis for federal habeas relief unless the petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. *See also Teague v. Lane*, 489 U.S.

288, 308 (1988) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72 (1976). To establish cause, the petitioner must show "that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). *Maples v. Thomas*, 565 U.S.---, 132 S. Ct. 912, 922 (2012) (citing *Coleman*, *Murray*). To establish prejudice, the petitioner must show "actual prejudice resulting from the errors of which he complains." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). The fundamental miscarriage of justice exception requires that the petitioner supplement his claims with a "colorable showing of factual innocence." *Id.* at 495.

B. Claims adjudicated by the state court

In cases where the claims presented in the federal habeas petition were adjudicated on the merits in the state courts, the federal court shall not grant habeas relief unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has made it clear that a habeas writ may issue under the "contrary to" clause of Section 2254(d)(1) if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court

"unreasonably applies it to the facts of the particular case." *Id.* This requires the petitioner to demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). When assessing the reasonableness of the state court's application of clearly established federal law to the claim that was before it, the federal court's review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. ---, 131 S. Ct. 1388, 1398 (2011)**.**

C. Standards for claims of ineffective assistance of counsel

The Supreme Court's standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and has been re-affirmed consistently since then. Pursuant to *Strickland*, counsel is presumed to have acted effectively unless the petitioner can demonstrate both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 686-88, 693-94. To satisfy the deficient performance prong of this analysis, the petitioner must show "'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. ---, 131 S. Ct. 770, 778 (2011) (quoting *Strickland*, 466 U.S. at 687). In considering this part of the standard, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id* (quoting *Strickland*, 466 U.S. at 689). The Court recognizes that there are "'countless ways to provide effective assistance in any given case'" and that "'[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" *Id.* at 778-89 (quoting *Strickland*, 466 U.S. at 689). In assessing whether counsel

performed deficiently, the court must "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time." *Id.* at 779 (quoting *Strickland*, 466 U.S. at 689). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* at 791.

IV. DISCUSSION

Hughes's first claim for relief concerns competency issues, attributing constitutional error to the court, and implicating the effectiveness of counsel, for his being tried for the Graham offenses in 1981 at a time when he allegedly was incompetent. (Pet. at 26 & ¶¶ 94-150.) His second claim — the one upon which we held an evidentiary hearing — is that counsel was ineffective for failing to present mental state defenses at trial. (Pet. at 45 & ¶¶ 151-56.) His third claim is that he "should not have been tried as an adult" (Pet. at 46 & ¶¶ 157-63), and his fourth and final claim is that the jury charge violated due process by incorrectly describing the Commonwealth's burden of proof and suggesting that a required element of the murder offense had already been established. (Pet. at 47 & ¶¶ 164-71.) We consider these claims in the order in which Hughes has presented them.

A. Competency issues

Hughes's first claim involves what he sets out as three distinct issues, two of which he characterizes as due process issues and one of which he characterizes as an ineffective assistance of counsel issue. First, he challenges the adequacy and reliability of the state procedures that were to protect his right to not be tried while incompetent. Within this claim, he alleges that he was subjected to an unconstitutionally high burden of proof on his assertion of competency (Pet. at 29 & ¶ 108); that the court failed to "hear and give effect to" various aspects of evidence of incompetency (Pet. at 29 & ¶¶ 109-23); that the competency determination made by the state court

was based upon inadequate and unreliable evaluations (Pet. at 35 & ¶¶ 124-34); and that the state court failed to conduct competency hearings at particular critical stages of his case (Pet. at 41 & ¶¶ 135-39). Second, he contends that counsel provided ineffective assistance on competency-related matters. (Pet. at 43 & ¶¶ 140-46.) Finally, he contends that he was tried while he was, in fact, incompetent. (Pet. at 44 & ¶ 147.)

Respondents assert that all but two aspects of these various claims are procedurally defaulted, and are therefore not reviewable by this Court. Respondents contend that in its consideration of these claims, the state court relied upon an independent and adequate state ground, namely that the claims were a mere variation on the claims Hughes previously litigated on direct appeal.[4] They contend that there is no basis for this Court to excuse the default of this claim. (Ans. at 14-15.)[5]

Review of this claim requires us to determine how Petitioner raised in the state courts these various contentions regarding the competency determination. In post-trial motions and on direct appeal to the Pennsylvania Supreme Court, Hughes contended that "the court erred in declaring Appellant competent to stand trial," citing the testimony of Dr. Blumberg that he was incompetent and of Dr. Saul that he was schizophrenic. (Br. for Appellant, Pa. S. Ct. No. 117 EDA Dkt. 1983, 12/31/86 at 7, 7-10.) On PCRA review, he raised the competency challenges that he raises in this

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[4] Hughes had asserted on direct appeal that the trial court erred in finding him competent in January 1981 to stand trial based upon the evidence in the record at the time of the state court ruling. *See Hughes-I*, 555 A.2d 1264, 1269-70 (Pa. 1989). Many of his PCRA and habeas claims focus instead on how the record could or should have been developed to lead to a different determination.

[5] Apart from the boilerplate assertion contained in each of the grounds of his petition that he could establish one of the two exceptions to excuse any procedural default of his claim, Hughes's petition does not address this question, nor did he file a reply to Respondents' assertion of procedural default.

petition. (*See, e.g.*, PCRA Pet. at 113 (section entitled "B. Failure To Hear, Consider And Give Effect To Evidence Of Incompetency"); *id.* at ¶¶ 120-69. *See also* Initial Br. of Appellant, Pa. S. Ct. No. 313 CAD, 1/14/02 at 42-46 (section entitled "ii. Failure to hear and give effect to evidence of incompetency.").) With respect to the entirety of Hughes's competency-related claims, which were broken down into various sub-claims set forth in 96 paragraphs over 56 pages of his counseled petition, the PCRA Court interpreted his claim as one "that he was tried while incompetent" and determined that this issue, previously litigated on direct appeal, could not be revisited. (PCRA Ct. Op., 4/4/01, at 11-12.) Hughes contended on appeal that the lower court had erroneously deemed his claim previously litigated, as his PCRA petition raised additional issues such as ineffective assistance of counsel and did not rest solely upon previously litigated evidence. (Initial Br. of Appellant, 1/14/02 at 54.) The Pennsylvania Supreme Court, however, similarly determined that Hughes could not obtain further review of the prior competency determination "by merely alleging the ineffectiveness of trial counsel and arguing that this Court failed to consider certain facts that were developed before it at the time of its review," absent an allegation of after-discovered evidence. *Hughes-II*, 865 A.2d at 778.[6]

The Pennsylvania Supreme Court's failure to adjudicate the various claims that it found to be "previously litigated" within the meaning of 42 Pa. Cons. Stat. § 9543(a) of the PCRA does not bar federal habeas review here. Petitioner's particular claims regarding the trial court's gatekeeping function and its alleged failure to permit certain evidence on the competency determination were

[6] As discussed below, the state court would, however, consider Hughes's constitutional claim concerning the burden of proof used in evaluating his competency, which it found implicated a different issue that was not addressed on direct appeal. *Hughes-II*, 865 A.2d at 778.

presented to the state court for the first time on PCRA review and cannot be considered co-extensive with the claims ruled upon on direct appeal. While the "previously litigated" rule insulates state courts from duplicative efforts, our Court of Appeals has found that it does not preclude federal habeas review. *See Boyd v. Warden*, 579 F.3d 330, 370-71 (3d Cir. 2009) (*en banc*) (Hardiman, J., dissenting in part).[7] Therefore, the state court resolution of these putative "previously litigated" claims should not preclude federal habeas review of their merits.

1. Challenge to the adequacy and reliability of procedures to protect Hughes from being tried while incompetent

The parties agree that "[a] defendant has a due process right not to be tried while incompetent." *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001). *See also Drope v. Missouri*, 420 U.S. 162, 172 (1975). In order to be competent to stand trial, a defendant must have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and possess "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*). The focus of a competency inquiry is the defendant's mental capacity and whether he has the ability to understand the proceedings. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993). Hughes's petition raises a number of challenges to the competency inquiries and determinations that took place in the state court in 1980 and 1981.

a. Burden of proof on incompetency claim

Hughes contends that the state court held him to an unconstitutionally high standard of proof

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[7] Judge Hardiman's opinion dissenting in part notes that "[a]ll members of the Court sitting *en banc* agree that the District Court correctly determined that Boyd's claim was not procedurally defaulted." *Boyd*, 579 F.3d at 364 (Hardiman, J., dissenting in part). *See also Johnson v. DiGuglielmo*, 343 F.3d Appx. 749, 749-50 & n.1 (3d Cir. 2009) (observing that the portion of Judge Hardiman's dissenting opinion discussing the "previously litigated" rule was jointed by a majority of the court).

when it assessed whether he was competent to stand trial, in violation of his right to due process. (Pet. ¶ 108.) As was the case with his PCRA petition, his federal petition implicitly relies upon *Cooper v. Oklahoma*, 517 U.S. 348 (1996), in which the United States Supreme Court invalidated on due process grounds an Oklahoma statute that, like the Pennsylvania statute in effect in 1981, required a defendant to prove his incompetency by clear and convincing evidence.[8]

The Pennsylvania Supreme Court rejected this claim on the merits when it was presented on PCRA review, concluding that the standard mandated by the statute in effect in 1981 was not in conflict with any decision of the United States Supreme Court at the time Hughes's conviction became final in 1989. *Hughes-II*, 865 A.2d at 779-82. After considering federal jurisprudence regarding the retroactive effect to be given to determinations of the United States Supreme Court, the state court found that *Cooper* was not retroactively applicable to Hughes's conviction and therefore denied relief. *See Hughes-II*, 865 A.2d at 780-82.

Hughes has not explained in his petition how this state court determination on PCRA review resulted in a decision that was contrary to, or an unreasonable application of, any clearly established federal authority, nor do we find that he meets his burden. The *Hughes-II* court properly applied *Teague v. Lane*, 489 U.S. 288 (1988), which described the standard for determining the retroactive application of a ruling of the United States Supreme Court to a state court conviction that is already

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[8] The Court in *Cooper* determined that due process was not offended by the notion of putting the burden of proof as to incompetence on the defendant asserting it and requiring him to overcome the presumption of competence with *a preponderance of the evidence*. The *Cooper* Court held, however, that the Oklahoma standard requiring the defendant to prove his incompetence *by clear and convincing evidence* presented the quite different question of whether a state could proceed with a criminal trial after a defendant had shown that he is *more likely than not incompetent*. The Court deemed this too much of a risk to the fundamental right not to be tried while incompetent.

final. Pursuant to *Teague*, a Supreme Court decision announcing a "new rule" of law is applicable retroactively to cases pending on *direct appeal* but not to those pending on *collateral review*, that is, where the conviction was already "final" at the time the "new rule" was announced. *See Teague*, 489 U.S. at 310. By limiting the effect of subsequent Supreme Court decisions, "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts, and thus effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore v. Taylor*, 508 U.S. 333, 339-40 (1993) (internal quotations and citation omitted).

As the *Hughes-II* court recognized, *Teague* carved out two narrowly-drawn exceptions to its rule prohibiting retroactive application of "new rules" to cases on collateral review. The first provides for application on collateral review of any new "substantive" rule, such as a decision narrowing the scope of a criminal statute or placing particular conduct beyond the reach of criminal punishment. *See Teague*, 489 U.S. at 311. The second allows for new "procedural" rules to be applied retroactively, but only as to the "small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," *Teague*, 489 U.S. at 313, those "without which the likelihood of an accurate conviction is seriously diminished" and which "alter our understanding of the bedrock procedural elements" essential to the fairness of the proceeding. *Id.* at 311. As the Third Circuit Court of Appeals has pointed out, "[t]o say that this [second] exception is extremely narrow is to understate the issue, for, as the Supreme Court itself has noted, it has 'yet to find a new rule that falls under the *Teague* exception'" for watershed procedural rules. *Lloyd v. United States*, 407 F.3d 608, 614 (3d Cir. 2005) (quoting *Beard v. Banks*, 542 U.S. 406, 417 (2004)). *See also Whorton v. Bockting*, 549 U.S. 406, 417-18 (2007) (observing

that, in the nearly 20 years since *Teague* was decided, the Court has "rejected every claim that a new rule satisfied the requirements for watershed status").

The standard announced in *Cooper* was, indeed, a "new rule" within the meaning of *Teague*. Prior case law had addressed whether a defendant may be presumed competent and bear the burden of proof as to incompetency, but that issue was distinguished by the Court from the issue before it in *Cooper* as to the nature of the burden of proof assigned to the defendant. *See Cooper*, 517 U.S. at 355 (discussing *Medina v. California*, 505 U.S. 437 (1992)). The Court's decision in *Cooper* was not dictated by prior Supreme Court precedent. Accordingly, in order for Hughes to benefit on collateral review from the "new rule" announced in *Cooper*, one of the *Teague* exceptions must apply.

This question has already been answered in the negative by colleagues in this Court. *See Attica v. Frank*, Civ. A. No. 99-5113, 2001 WL 827455, *5-*6 (E.D. Pa. July 11, 2001) (Padova, J.); *id.*, 2001 WL 34075415, *4-*5 (E.D. Pa. May 21, 2001) (R&R of Hart, M.J.). We agree with their reasoning and find that Hughes cannot demonstrate that he met the first *Teague* exception in that *Cooper* did not announce a new *substantive* rule but rather a *procedural* rule. With respect to the second *Teague* exception, we agree that *Cooper*'s reduction in the burden of proof as to a claim of incompetency does not sufficiently implicate "the fundamental fairness and accuracy of the criminal proceeding" as to qualify as a "watershed" rule. *Teague*, 489 U.S. at 313. While the effect of *Cooper* is a reduced risk that someone will be tried while incompetent, we do not believe that case "remedied an impermissibly large risk of an inaccurate conviction," *Whorton v. Bockting*, 549 U.S. 406, 418 (2007), nor that the *Cooper* rule stands out from the litany of important constitutional principles that the Supreme Court has nonetheless declined to characterize as "watershed" rules.

The Pennsylvania Supreme Court in *Hughes-II* conducted a retroactivity analysis in accordance with the United States Supreme Court decision in *Teague*. It properly determined that *Cooper* was a new rule that was not subject to either of the exceptions to the *Teague* retroactivity bar. *See also Hughes-II*, 865 A.2d at 778-82. Given the inapplicability of *Cooper* to Hughes's due process claim, we find nothing unreasonable in the trial court's presumed application of the higher burden of proof standard to Hughes's incompetency claim at trial in 1981[9] or in the state high court's decision on PCRA review in 2004 not to apply the *Cooper* standard retroactively. Hughes is not entitled to habeas relief on his due process claim regarding the burden of proof applied to his claim of incompetence.

b. Evidence permitted and considered

Hughes next contends that "the trial court's competency determination violated due process when the court refused to allow, hear or give proper weight to probative evidence of incompetency." (Pet. ¶ 109.) He alleges six instances of error by the trial court: (1) in refusing to hear or consider lay testimony from Hughes's family members regarding his tendency to speak in grunts and stare blankly into space (Pet. ¶ 110); (2) in refusing to consider or give effect to counsel's opinion that Hughes was incompetent and to counsel's report that he could not rationally communicate with his client because of Hughes's mental illness (Pet. ¶ 111); (3) in refusing to consider evidence of a

[9] The state supreme court found that the trial court was "less than clear" in its post-trial opinion as to the standard that it employed when considering the competency question. *Hughes-II*, 865 A.2d at 779 n.14. Respondents contend that the court did not, in fact, apply in this case the allegedly improper burden of proof when Hughes was found competent to stand trial in January 1981 because, pursuant to another part of the statute in effect, the earlier finding of *incompetence* put the burden of proof as to *competence* on the prosecution. (Ans. at 19-20.) This dispute ultimately has no impact upon the issue before us on habeas review.

history of mental illness and incompetency (Pet. ¶ 112); (4) in refusing to hear or consider evidence that Dr. Blumberg was prepared to offer regarding the deficiencies in the competency evaluations performed by other psychiatrists (Pet. ¶¶ 113-14); (5) in failing to properly consider and in denigrating Dr. Blumberg's evidence (Pet. ¶¶ 115-19); and (6) in posing questions to Dr. Saul based on a mischaracterization of Dr. Blumberg's findings (Pet. ¶¶ 120-23). In light of our discussion above finding that federal review is not precluded by the state court's labeling of this claim as "previously litigated" within the meaning of the PCRA, we address the merits below of each of the alleged trial court errors that Hughes raises.

(1) Lay testimony

Pointing to the court's denial of counsel's request on the second day of the competency hearing to put on a lay witness, Hughes complains that the court "refused to hear or consider any lay testimony and, instead, held that it would consider *only expert opinion testimony*." (Pet. ¶ 110.) He contends that proffered testimony of his family members regarding their difficulties in communicating with him would have supported a finding of incompetency, as lay testimony is relevant and "often critical" in a competency determination. (*Id.*) Hughes cites to the proffer of Attorney Tinari at the beginning of the competency proceeding held on January 28, 1981 that:

> I have members of [Petitioner's] family and they are in the courtroom. … Both of them have gone to the prison to visit Mr. Hughes, … and they have reported to me that every time they go in to speak with Mr. Hughes, attempting to speak with him, they cannot in any way engage in any kind of a conversation, that the most they can get from Mr. Hughes are grunts and, at best, a hello and a goodbye, that he appeared to be staring out into the wild blue yonder . . . not communicating at all. There isn't any eye contact, there isn't even this kind of communication that takes place by Mr. Hughes.

(Pet. ¶¶ 51, 110.) The next day, after Drs. Camiel and Blumberg had testified, Attorney Tinari

sought to "proffer evidence on the question of competency" and indicated that he intended to call a lay witness. Judge Latrone stated that he "would only want an expert" and ordered a third psychiatric evaluation of Hughes. (N.T. 1/29/81 at 80.)

While the proffered lay testimony might have had some probative value as to Hughes's communication skills generally or his comprehension of his position as one accused of serious crimes, we cannot say that the ruling denying counsel leave to call a lay witness following the testimony of two psychiatrists violated Hughes's due process rights. Based upon counsel's proffer, Judge Latrone had already agreed to hear testimony from the experts, who could focus more directly on Hughes's mental health and its effect on his ability to consult with his attorney and appreciate the proceedings with a reasonable degree of rational understanding. What Judge Latrone needed at that point in the face of divergent psychiatric opinions was not more lay testimony but rather an opinion that could resolve the conflicting expert opinions.[10]

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[10] We also note that the proffer made by Attorney Tinari concerning the observations of Hughes's family members dated to November and December 1980. *See* N.T. 1/28/81 at 16-17 (identifying Ms. King and Mr. Morris Hawthorne as an aunt and uncle who had been to visit Hughes twice in those months). While that is not so very far removed in time from the date at which Attorney Tinari brought his concerns to the attention of the court in late January 1981, Judge Latrone was mindful that the symptoms that give rise to incompetency are not static. Responding to Tinari's question as to whether the third expert should have the benefit of other doctor's assessments of Hughes's competency, Judge Latrone explained:

> THE COURT: You see, the problem with competency, Mr. Tinari, as we well know, is that you could be competent thirty days before today – I have instances in which he could be incompetent the day before, because of an emotional disorder. It gravitates, oscillates, aberrates up and down.
>
> I am interested about at the time of trial. [sic] Insanity is not incurable, is it? Emotional disorder can be curtailed and curbed. That's why I think that to rely on the history is not a sound basis to determine a person's – you can look at a guy's
>
> (continued...)

In light of the information that was available both from Judge Latrone's own colloquy of Hughes[11] and from the contemporaneous reports of three experts, we do not believe that the decision to preclude Hughes's family members from offering evidence as to their observations of and interactions with him during prior visits is so erroneous as to undermine the reliability of the competency determination and violate Hughes's due process rights.

(2) Counsel testimony

In a similar vein, Hughes complains that the court "did not consider or give effect to counsel's observations" that Hughes was not communicating effectively with him. (Pet. ¶ 111.) Hughes complains that the court refused to consider this evidence because Judge Latrone "would consider only expert opinion testimony." (*Id.*)

Tinari explained to the court early in the proceeding, which had been convened for resolution of suppression motions but which turned into two days of testimony on competency:

> I personally have had difficulty with Mr. Hughes in the sense that we

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[10](...continued)

> history six years ago. It doesn't mean that he is going to be incompetent to stand trial today. You can look at it last week.
>
> Do you see what I mean?
>
> MR. TINARI: Absolutely. We agree with the Court.

(N.T. 1/29/81 at 83.) The court thus manifested an appreciation of the changing nature of Hughes's condition over many months of observation throughout 1980 and continued up to and during the 1981 trial.

[11] The court ascertained for itself that Hughes "knows where he is, why he is here, and when he is here" during a colloquy on January 28, 1981. (*See* N.T. 1/29/91 at 22-26.) It was because the court wanted to be "absolutely certain of his competency" that it ordered an immediate psychiatric examination of Hughes and a report from the psychiatrist on the record in court. (*Id.* at 26.)

> cannot effectively communicate. The best I can get from him is a grunt. The best I do get from him is a smile. The best I get from him is him looking down rather than looking at me. The best that I can do under these circumstances, Your Honor, is to continue to talk and talk and see whether or not at some point in time he would agree with what I am saying or disagree. I get none of those.

(N.T. 1/28/81 at 17-18.) We agree that counsel's observations regarding his client's ability to consult with him and to understand the proceedings against him bear upon key issues in the competency assessment. However, we do not agree that the court's statement on January 29, 1981 that it would only want to hear from an expert, not a lay witness, at that point in the proceedings reflects that the court refused to consider counsel's testimony about his communication difficulties with his client. It is evident that Judge Latrone seriously considered counsel's representations on these matters on January 28 and agreed that counsel's observations warranted further expert evaluation regarding Hughes's mental capacity to comprehend his position and cooperate with counsel. In fact, the record reflects that it was counsel's description of his interactions with Hughes that prompted the court to grant his request for an immediate renewed competency evaluation. (N.T. 1/28/81 at 18, 26.) Therefore, the court appears to have both "considered" and "given effect" to counsel's observations and did not violate Hughes's right to due process in this regard.

(3) History of mental illness and incompetency

Hughes next asserts that his "history of mental illness and incompetency is *highly probative*" and would have supported a finding of incompetency in January 1981 and that the court violated due process when it "refused to hear or consider" evidence on these subjects. (Pet. ¶ 112.) He points to Judge Latrone's remark that "we are not interested in the psychiatric history" and to his direction that the third testifying psychiatrist evaluate Hughes without benefit of the testimony of the other

experts, as the court wanted an independent view and believed that "to rely on the history is not a sound basis to determine a person's [competency]." (*Id.*, citing N.T. 1/28/81 at 62, 82-83.)

The court did not, however, exclude all evidence of Hughes's history of mental illness and incompetency. While Hughes criticizes the trial court for "preclud[ing] questions and testimony about mental health history" during the testimony of Dr. Blumberg (Pet. ¶ 112, citing N.T. 1/28/81 at 62), Dr. Blumberg's exchange with the court during his testimony reflects the court's legitimate interest in ensuring that Dr. Blumberg's testimony focused on the question of *current* competency based upon his firsthand observations and assessment and that it not devolve into a critique of the examinations performed by other professionals.[12] The court also acted within its discretion in

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[12] The reference to the psychiatric "history" about which Hughes complains arose during the direct examination of Dr. Blumberg, who was the second expert to testify as to Hughes's competency and who examined Hughes on short notice:

> [MR. TINARI:] Sir, would you tell this Court what you did during the course of that examination this afternoon?
>
> [DR. BLUMBERG:] I asked him many questions to provide information, data. I asked a lot of the routine questions, but I also followed some lines of questioning that seemed to me -- that deserved pursuing, and that were not pursued by the other psychiatrists.
>
> [PROSECUTOR:] Objection, Your Honor. I move that that answer be stricken.
>
> THE COURT: Sustained.
>
> BY THE COURT:
> Q. Were you there when the other psychiatrists interviewed him?
>
> A. No, sir.
>
> THE COURT: All right. Strike the answer.

(continued...)

directing the third psychiatrist to examine Hughes and offer an opinion on competency without having been exposed to the opinions of colleagues. This procedure did not violate the fairness of the proceedings.

(4) Limit on testimony of Dr. Blumberg

Following upon his prior allegation of error, Hughes also contends that the court violated his due process rights when it did not permit Dr. Blumberg to testify as to deficiencies in the competency evaluations performed by other psychiatrists. (Pet. ¶ 113.) He contends that the line of questioning defense counsel sought to pursue would have explained that the other examiners' routine questions did not uncover Hughes's delusional thought processes. (Pet. ¶ 114.)

The court's limitation on the scope of Dr. Blumberg's testimony at that point in the proceedings did not violate Hughes's due process rights. The court expressed its concern that Dr. Blumberg's testimony was moving from an explanation of the examination he conducted to a critique of the examination performed by another doctor for which he was not present and whom, therefore, he was not in a position to judge. Moreover, while Petitioner complains that the court refused to hear or consider testimony that Dr. Blumberg would have given, and that "important evidence of incompetency was never heard or considered by the court," (Pet. ¶ 114), the delusions and "magical thinking" that Hughes contends the other psychiatrists failed to detect were testified

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[12](...continued)

> MR. TINARI: If the Court pleases, we are speaking about his examination and of other reports and the formation of his opinion at this time. I think it is proper.
>
> THE COURT: We are not interested in the psychiatric history. We are interested in his condition today, January 29th.

(N.T. 1/29/81 at 61-62.)

to by Dr. Blumberg. (N.T. 1/29/81 at 63, 68-70.) The fact that Dr. Blumberg was not permitted to critique the other psychiatrists and their alleged failure to have detected delusional and magical thinking at the time they evaluated Hughes did not rise to a due process violation.

(5) Treatment of Dr. Blumberg's testimony

Hughes contends that the court also violated his due process rights when it "failed to consider compelling evidence of incompetency presented by Dr. Blumberg" and instead "mischaracterized, and then improperly denigrated, Dr. Blumberg's findings." (Pet. ¶ 115.)

Hughes takes issue with a comment made by Judge Latrone that Dr. Blumberg's conclusion "doesn't sound like a medical opinion" but rather "a soothsayer's proverb" because "he is telling me that he has a sense that the man is incompetent although everything is all right." (N.T. 1/29/81 at 83.) He contends that the court "seized upon" Dr. Blumberg's use of the word "intuition" to mischaracterize the doctor's findings as 'emotional' rather than 'objective.'" (Pet. ¶ 116, citing N.T. 1/29/81 at 78.) We do not agree that these portions of the record reflect a violation of Hughes's due process rights.

Dr. Blumberg testified that many of Hughes's responses to his questions in the examination were rote and that he "had this feeling" that Hughes had been schooled to give those "correct" answers, e.g., answers that suggested Hughes understood the charges against him and the court process, and that Dr. Blumberg believed that Hughes did not, in fact, understand them. (N.T. 1/29/81 at 74-75.) He explained that it was "a professional feeling that [he] had" but that he could not prove it without further testing, such as a Rorschach evaluation, and that it would be "very difficult to prove." (*Id.* at 74.) Judge Latrone sought to explore how Hughes could have come to be in possession of the "right" answers to the questions if they were not his genuine responses and

whether the fact that Hughes had been asked the same questions the day before in court might explain his quick answers to the questions posed by Dr. Blumberg. (*Id.* at 75-76.) The direct examination concluded with the following:

> [DR. BLUMBERG:] It is my profound professional intuition and judgment - -
>
> [THE COURT:] Your intuition. All right. Go ahead.
>
> A. - - that those answers did not feel right. I said I could not prove it. It's related to, through the years, questioning thousands of people and getting a sense of when you are being lied to, when you are not being answered directly, when the answers are not spontaneously arising. It's not peculiar to me; social workers get a feeling like this. I have talked to policemen; they get a feeling like this - - private detectives, people in all branches of law enforcement. Teachers get it about their children. Parents get it about their children.
>
> It is an accumulation of know-how built up through the years. I cannot prove it, sir. It is just my opinion.
>
> Q. So you are saying that your opinion is based on intuitive emotional evaluation of the situation in lieu of your objective medical knowledge of the situation?
>
> A. No, sir.
>
> Q. Well, that's what you just said.
>
> A. Well, that was an explanation of an aspect of it you were addressing me about, sir. My opinion is based on the sum total of all my experience and all my knowledge and all my instincts in examining this man.
>
> [MR. TINARI:] So that the record is clear, your determination is that he is incompetent at this time to stand trial?
>
> A. Yes, sir.

(N.T. 1/29/81 at 77-78.) (*See also* Pet. ¶ 115 (quoting from same).)

While the court challenged Dr. Blumberg, it obviously did not dismiss his findings outright,

as it was on the basis of Dr. Blumberg's testimony that Judge Latrone ordered a third evaluation to be performed. (N.T. 1/29/81 at 80, 81.) Judge Latrone did not "mischaracterize" or "denigrate" Dr. Blumberg's findings in any manner that could be deemed violative of Hughes's due process rights, particularly in light of the larger record. This claim does not warrant habeas relief.

(6) Hypothetical posed to Dr. Saul

The final assignment of error that Hughes makes with respect to the court's alleged "failure to hear and give effect to evidence of incompetency" is that the court questioned Dr. Saul using a flawed hypothetical which, Hughes contends, resulted in Dr. Saul giving unreliable and inadequate opinion evidence. (Pet. ¶¶ 120, 122.) He asserts that, had Dr. Saul been asked questions about another expert's finding of incompetency where the patient was found to be suffering from delusional thinking, Dr. Saul, *inter alia*, "would have admitted that such delusions are consistent with his own diagnosis of schizophrenia" and would have admitted that this delusional thinking may not have revealed itself in the course of his short and routine examination of Hughes. (Pet. ¶ 123.)

Petitioner is concerned with an exchange between the court and Dr. Saul that took place after Dr. Saul, in response to Attorney Tinari's attempts to reconcile his opinion with that of Dr. Blumberg, explained that "[t]here are doctors who have many different kinds of trainings and many different experiences in the field, and some doctors do things completely different from other doctors." (N.T. 1/29/81 at 94-95.) Judge Latrone then inquired:

> [THE COURT:] How would you evaluate an expert medical-psychiatric opinion that the expert giving the opinion intuitively feels that X or Y or A or B is incompetent to stand trial?
>
> A. If I understand the question, what rating do I give to intuition of a psychiatrist evaluating a patient?

Q. Yes.

A. I think intuition is a very subjective matter, depending upon the own personal experiences or personal lifestyles of the individual making an intuition. It's a nice thing to have and it's a nice thing to look into, but it doesn't carry very much weight in light of clinical information, background information, history, and an actual evaluation. It is something that may tip off the psychiatrist, for example, to pursue a certain area, but just intuition itself without scientific information and data is not very worthwhile.

(N.T. 1/29/81 at 95.) After further questioning by Tinari, the court proceeded to ask the question with which Hughes here takes issue:

[THE COURT:] How would you evaluate the opinion of an expert concerning competency, which goes as follows. Assuming hypothetically, from your expertise, give me your expert evaluation. "As the result of my evaluation, I find that the accused understands he is on trial. As the result of my interview, I find that the accused understands the charges for which he is being tried. I understand from my interview that the accused can communicate with his lawyer. However, notwithstanding the results of my interview disclosing that, I determine through my expertise and intuition that he is incompetent"?
[Objection overruled.]

A. You want me to evaluate that statement?

Q. Yes.

A. I would not hold that opinion in high regard because the data says something. The data is extremely important. He then negates the data, supposedly the scientific data that was collected, by saying that, "My intuition says that all the data I collected is wrong, and that really the determination is opposite from what the data says."

I think it is a contradictory statement and, again, I think intuition can be a very dangerous thing and is too subjective in a matter such as this to be held in any high regard.

(N.T. 1/29/81 at 97-98.)

Hughes contends that Dr. Saul's answer is "unreliable and not helpful" because the

hypothetical omitted the primary basis for Dr. Blumberg's finding of incompetence, namely, Hughes's delusions. (Pet. ¶ 122.) The hypothetical may not have perfectly captured Dr. Blumberg's testimony, but we fail to see how this would have changed Dr. Saul's opinion on the competency question. Dr. Saul recognized that Hughes had a mental illness, but could reconcile the diagnosis with his opinion that Hughes was competent to stand trial:

> I can understand what [the other psychiatrist in the hypothetical question] means because this man does have a schizophrenic illness. As a psychiatrist, yes, I do feel this man's illness, but his illness is in remission now. His illness is under control now to such extent that he is now capable of standing trial. A man may have a psychotic illness and also be competent.
>
> I do feel the illness - - nobody asked me about the diagnosis but I feel that he does have a psychotic illness under good control with medication to the extent that he is now competent to stand trial.

(N.T. 1/29/81 at 100.) We do not believe that this questioning of Dr. Saul reflects a violation of due process.

Having addressed the six instances in which Hughes contends that the trial court failed to "hear and give effect to evidence of incompetency," we proceed to consider the third general area in which Hughes contends he was not afforded adequate protection of his right to not be tried while incompetent.

c. Adequacy and reliability of mental health evaluations

Hughes contends that the competency proceedings were also rendered inadequate and unreliable — and therefore violated his due process rights — by the trial court's reliance on "inadequate evaluations" by Drs. Camiel and Saul. (Pet. ¶ 124.) He claims that the doctors' evaluations were unreliable because the doctors did not spend sufficient time with him (Pet. ¶ 125), did not perform necessary testing (Pet. ¶ 126), relied too heavily on routine mental status exams (Pet.

¶ 127), and did not adequately consider the effects of the medication he was taking at the time (Pet. ¶ 131), such that they did not recognize various indicia of his incompetency, particularly with respect to his delusional thinking and organic brain damage. (Pet. ¶¶ 129-30.) He contends that their testimony also demonstrates that they relied on inaccurate information, further undermining the reliability of their opinions. (Pet. ¶ 128.) For the reasons set forth *supra* regarding the inapplicability of the procedural default doctrine to claims deemed "previously litigated," we will address the merits of this claim.

We fail, however, to see how the issues raised by Petitioner here could be said to undermine the legitimacy of the procedures to which he was entitled before being declared competent or to implicate the adequacy of the protections of his right not to be tried while incompetent. Rather, these allegations constitute a challenge to the factual finding of the trial court that he had regained his competence by January 1981. The adequacy of the evaluations performed by Drs. Camiel and Saul and the trial court's reliance upon them implicates the trial court's credibility determination with respect to these witnesses and the weight to be given their opinions — which are factual findings entitled to a presumption of correctness under 28 U.S.C. § 2254(e). These findings cannot be disturbed unless Hughes rebuts the presumption of correctness of Judge Latrone's findings in this respect by "clear and convincing evidence." *See id.*

We do not believe Hughes has met this standard. Drs. Camiel and Saul were qualified as experts in the field of psychiatry. Each was charged with evaluating Hughes for the purposes of determining his competency to stand trial. Each was asked if he was able to reach an opinion regarding Hughes's competency to stand trial as of that date, and each answered in the affirmative. They also demonstrated that they understood the components of the competency inquiry that they

had extensive experience assessing defendants' competency. (N.T. 1/29/81 at 45, 92-93.) The trial court had no reason to believe that the amount of time these doctors spent with Hughes or the particular questions asked were inadequate for them to reach their conclusion that he was competent at that time to stand trial. None of the experts — not even Dr. Blumberg, the defense expert — indicated that neuropsychological or psychological testing would be necessary for an opinion to be rendered on Hughes's competency, nor did trial counsel request that the court arrange for such testing. Furthermore, while Petitioner takes issue with the amount of time these doctors spent with him and the lack of "collateral information," Dr. Camiel was in the unique position, among the three psychiatrists who testified in the competency hearings, of being able to contrast Hughes's status on that date with his examination of him on a previous date. (N.T. 1/29/81 at 48.) In addition, Dr. Camiel's testimony reveals that he had reviewed reports concerning Hughes's treatment in the state hospital, which provided him with some longitudinal history. (N.T. 1/29/81 at 52.) Dr. Camiel's testimony also affirmatively demonstrates that he sought to uncover whether Hughes was experiencing any delusions or paranoia, as he testified that Hughes acknowledged that he had felt that way before but he reported on January 28 that he had not experienced those feelings in some time. (N.T. 1/29/81 at 51.)

Dr. Saul's evaluation also explored whether Hughes was hearing any voices at that time, but noted that Hughes reported that he only heard them at night or in his quiet cell and only occasionally. (N.T. 1/29/81 at 88, 90.) Thus, both Dr. Camiel and Dr. Saul were aware of the issue of Hughes's history of delusions yet concluded this did not interfere with his competence to stand trial as of the time each evaluated him. Finally, we do not believe that any misinformation that Hughes might have given to Dr. Saul concerning his family mental health history, his ability to read and write, his prior

hospitalizations, and other historical data, as detailed in the Petition at ¶ 128, significantly undermines the reliability of Dr. Saul's opinion that Hughes was competent to stand trial on the date he evaluated him. Moreover, Judge Latrone had the benefit of additional information regarding Hughes — including his own observations and his test of Hughes's ability to, *inter alia*, read (N.T. 1/28/81 at 24) — such that any misunderstanding by Dr. Saul on any point that might be relevant to the competency assessment would have been apparent to Judge Latrone.

In conclusion, we do not find that Hughes raises a sufficient issue as to the "adequacy" and "reliability" of the evaluations performed by Drs. Camiel and Saul as to overcome the presumption of correctness attending to the competency finding of Judge Latrone that was based in part upon their opinions. We do not find that the evaluations conducted by Drs. Camiel and Saul reflect constitutionally inadequate, unreliable procedures for the protection of protect Hughes's due process right not to be tried while incompetent.

d. Failure to inquire into competency at critical stages

The fourth and final aspect of Hughes's assertion that the trial court did not employ adequate procedures to ensure that he was not tried while incompetent is his contention that the court failed to conduct competency hearings at four specific points in his case, specifically: at the March 10, 1980 hearing before the Honorable Paul Ribner regarding the petition to transfer the case to juvenile court, as well as upon his subsequent receipt of information that Hughes was psychotic, which resulted in Judge Ribner involuntarily committing him (Pet. ¶ 136); at the beginning of his trial on February 26, 1981, which was more than a month after his last competency hearing (Pet. ¶ 137); when he took the stand at trial, beginning on March 16, 1981 (Pet. ¶ 138); and when Judge Latrone observed Hughes engaging in odd behavior during a break in the closing arguments of the penalty

phase of the case (Pet. ¶ 139).[13] For the same reasons set forth above with respect to the assertions that there was evidence that the court failed to "hear and give effect to" and that the proceedings were procedurally unreliable because they relied on inadequate evaluations, we will address the merits of this claim.[14]

We reiterate that "[a] defendant has a due process right not to be tried while incompetent." *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001) (citing *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975), and *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). As our Court of Appeals has noted, "Due Process requires the trial court to inquire *sua sponte* as to the defendant's competence in every case in which there is a reason to doubt the defendant's competence to stand trial." *Id.* The Supreme Court has found a defendant's rights were violated where the trial court failed to hold a hearing as provided for in the applicable state statute and where sufficient indicia of incompetence was present to put the trial court on notice of a potential problem. *See Drope*, 420 U.S. at 173; *Robinson*, 383 U.S. at 385. We proceed to consider the four points in time at which Petitioner contends the state court should have held a competency hearing and violated due process by failing to do so.

(1) Adult/juvenile transfer proceedings

Petitioner contends that his competency should have been investigated at the time Judge

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[13] The trial court's final assessment of Hughes's competency was conducted on January 28 and 29, 1981.

[14] In the *Hughes-II* opinion, the Pennsylvania Supreme Court characterizes the claim that Hughes raised as counsel's ineffectiveness in failing to seek a competency hearing at each of the critical stages of the trial. *Hughes-II*, 865 A.2d at 777. However, our review of Hughes's brief to the state supreme court on PCRA review demonstrates that he raised in that venue the same claim he raises here: that the court violated his due process right by not holding competency hearings at particular times when it should have. (Initial Br. of Appellant, No. 313 C.A.D., 1/14/02, at 51-53.) The supreme court does not appear to have addressed the underlying claim directly.

Ribner presided over the March 10, 1980 hearing on his petition to transfer the Graham case from criminal court to juvenile court. (Pet. ¶ 136.) We find that he was not denied adequate protection of his due process rights when the court failed to assess his competency at that time.

There is no question that a defendant's due process rights are violated when he is *tried* when he did not have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or did not possess "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*). These concerns, however, are not implicated by a defendant's alleged incompetency during a preliminary proceeding to determine the venue in which the charges against him would be heard. While we are unaware of any caselaw in this circuit on the extent to which the right to a competency determination extends to preliminary proceedings such as the transfer hearing held in this case, we do not believe that any deficiencies in Hughes's ability to consult with his attorney at the time of the transfer hearing or to understand the proceedings against him generally or the nature of that particular hearing impacted the outcome of the transfer hearing or undermined the reliability of the outcome of his trial a year later.

The Supreme Court addressed the perhaps analogous issue of a defendant's right under the Due Process Clause to be physically present for court proceedings in *Kentucky v. Stincer*, 482 U.S. 730 (1987). Stincer had been excluded from a pre-trial hearing on the competency of two child witnesses. The Court noted that a defendant "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Stincer*, 482 U.S. at 745. The Court concluded, however, that the defendant's due process rights were not violated by his exclusion from the competency hearing given that the hearing

focused on the children's ability to recall facts and appreciate the need to tell the truth, which did not "bear a substantial relationship to [the] defendant's opportunity [to] better defend himself at trial," and where the defendant had not offered any evidence that his presence at the hearing regarding the witnesses' competency could have assisted his counsel or the judge in coming to a more reliable determination of that question. *Id.* at 746-47. *See also id.* at 747 (observing that "there is no indication that [he] 'could have done [anything] had [he] been at the [hearing] nor would [he] have gained anything by attending'") (quoting *United States v. Gagnon*, 470 U.S. 522, 527 (1985) (*per curiam*)).

Similarly, we believe that the 1980 transfer hearing did not bear a substantial relationship to Hughes's "opportunity [to] better defend himself at trial," *see Stincer*, 482 U.S. at 746, and, as a result, that the Due Process Clause did not require his competent presence for the proceeding. While Hughes was not physically excluded from the transfer hearing as was the defendant in *Stincer* for the witness competency hearing, we cannot say that any deficiency in his ability to consult with Attorney Spurio or in his understanding of the proceedings against him undermined either his attorney's ability to present the case for a transfer to juvenile court or Judge Ribner's ability to reliably determine whether a transfer was appropriate. Defense counsel's focus at the transfer hearing was Hughes's amenability to rehabilitation in a juvenile institution. (N.T. 3/10/80 at 5, 7.) While the prosecution's focus at the transfer hearing admittedly was on Hughes's criminal history and the details of the crime, Judge Ribner appreciated that he was not determining Hughes's guilt or innocence but merely considering whether, if the Commonwealth could ultimately prove that Hughes committed some or all of the crimes of which he stood accused, he was someone who was "amenable to rehabilitation or treatment or handling through the juvenile court." (N.T. 3/11/80 at

100.) We doubt that there was anything that Hughes or his counsel could have done to have convinced the court otherwise given the nature of the crimes of which Hughes stood accused and the limitations of the juvenile facilities and system. On this record, and given the fact that the transfer proceeding did not bear a substantial relationship to Hughes's opportunity to defend himself at a proceeding in the Court of Common Pleas, we do not believe that the court's failure to *sua sponte* conduct some sort of competency hearing before deciding the transfer motion violated Hughes's due process rights.[15]

(2) Start of trial

Hughes next contends that the state court should have held a competency hearing "at the beginning of the trial," presumably on February 26, 1981, notwithstanding the competency determination made on January 29, 1981 when the suppression motion was to be litigated, in light of the fact that he "was known to regress into more severe mental illness and incompetency when in a prison setting or under stress" and "given counsel's representations that Petitioner could not aid counsel or assist in his defense." (Pet. ¶ 137.) We disagree.

First, we note that Hughes fails to point to any evidence in the record that, on or around February 26, 1981, counsel "represented" to the court that Hughes could not aid him or assist in his

[15] We also observe that Judge Katz made a determination on the related question of ineffective assistance of counsel as to the assessment of Hughes's competency at the time of the transfer hearing in his September 25, 2007 Memorandum and Order. *See* Doc. No. 34 at 15-18 (finding no prejudice to Hughes even if counsel failed to show that he was incompetent at time of transfer hearing on March 10, 1980 because he was found competent on October 10, 1980, before his case had progressed in any significant respect).

defense. Our review of the transcript of the first day of trial[16] demonstrates that defense counsel raised issues as to courtroom spectators and the jury but did not suggest any problems involving Hughes himself. Hughes appears to have responded appropriately when the court arraigned him at that time. Moreover, by this date in late February, Hughes had been appearing before Judge Latrone for some time for proceedings involving his suppression motion that followed upon the determination of his competency. (*See* N.T. 1/30/81 at 105; N.T. 2/2/81 at 193; N.T. 2/3/81 at 364; N.T. 2/4/81 at 2.3; N.T. 2/5/81 at 2.116; N.T. 2/6/81 at 2.282; N.T. 2/9/81 at 2.374; N.T. 2/10/81 at 2.461A; N.T. 2/11/71 at 2.617; N.T. 2/13/71 at 2.763.)[17] Hughes also testified on February 11, 1981 as part of the suppression hearing. (N.T. 2/11/81 at 2.722-2.736.) Petitioner has not directed our attention to anything contained in the pre-trial record that would reflect on his competency to stand trial beginning on February 26, 1981.

The court had devoted significant time and resources into the assessment of Hughes's competency on January 28 and 29, 1981, a point in time in which the case was on the verge of trial. At the time he was evaluated by Drs. Camiel, Blumberg, and Saul in late January 1981, Hughes was already faced with the conditions that allegedly caused him to regress: confinement in prison and the stress of an impending trial. Notwithstanding those factors, the court found Hughes to be competent as of January 29, 1981, and, with the support of his doctors, directed that he continue his medication regimen. Absent evidence to the contrary, there would be no reason to assume that his mental health

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[16] Apparently jury selection began on February 17, 1981. (*See* N.T. 2/13/81 at 2.844 (setting date for jury selection following ruling on motion to suppress).) The Commonwealth made its opening statement and began presenting its evidence on February 26, 1981.

[17] We assume he was likewise present during jury selection, although we do not have transcripts of those proceedings.

had deteriorated in such a way as to affect his competency and require another evaluation four weeks later. We simply do not see sufficient reason in the record for Judge Latrone to have doubted Hughes's competency to stand trial on or around February 26, 1981 and therefore conclude that his due process rights were not violated by the court's failure to have inquired *sua sponte* into his competence at that time.

(3) Hughes's trial testimony

Hughes's third contention is that the court's failure to inquire into competency at the stage of the proceedings where he testified violated due process. (Pet. ¶ 138.)[18] Hughes again points to "what the court knew about Petitioner's mental illness and tendency to regress when under stress" as the apparent basis for the court's duty to inquire into his competency at that point. (*Id.*)

For the same reasons explained above with respect to the start of trial, we find Petitioner has failed to point to sufficient evidence from which the trial court would have had reason to doubt Hughes's competence to continue to stand trial at the time he took the stand beginning on March 16, 1981. This date was approximately six weeks after he had been subjected to three psychiatric evaluations and found to be competent. The interim period of time was largely spent attending proceedings presided over by Judge Latrone. Petitioner has identified no behavior or complaints that should reasonably have caused the judge to question anew Hughes's competence. We decline Hughes's implicit invitation to assume that he must not have been competent when he chose to take

[18] It is somewhat unclear from the petition as to the precise point in time at which Hughes contends the court should have inquired into his competency: prior to Hughes taking the stand on direct examination, since "[a]n incompetent defendant cannot rationally make the decision whether or not to testify," or, in hindsight, after the prosecutor, in a "withering cross-examination," "took full advantage of [Hughes's] severe cognitive impairments, impaired judgment, lack of insight, confusion, childlike nature and drugged state." (Pet. ¶ 138.)

the stand by evaluating, with the benefit of hindsight, the persuasiveness of his testimony.

(4) Penalty phase

The final point in time in which Hughes contends the court should have investigated his competency was during the penalty phase of the case when, "[a]fter defense counsel's penalty-phase closing argument and just before the prosecutor's argument," "the court noted that Petitioner was drawing pictures and putting them on counsel table" and counsel stated that Petitioner "was also writing nursery rhymes." (Pet. ¶ 139.)

Hughes's competency at the penalty phase of the proceedings is a moot point for purposes of this petition. The penalty phase, of course, involved the significant assessment of whether Hughes would receive a death sentence or a sentence of life imprisonment, and his ability to consult with his attorney would be relevant if his death sentence was still at issue. However, that sentence has been vacated and Hughes has been re-sentenced to the statutory minimum sentence of life imprisonment. The events of the penalty phase of the case, therefore, are no longer directly relevant and cannot provide a basis for habeas relief. Moreover, we do not find that any decompensation that Hughes may have exhibited after the jury returned its guilty verdict to be sufficiently reliable evidence of incompetency during the guilt phase of the trial given the changed circumstances brought about by the conviction.

In conclusion, we find that Hughes's due process rights were not violated by the court's failure to evaluate his competency *sua sponte* at the four points in time that Hughes identifies in his petition. This leaves two remaining claims relating to competency issues: one as to the alleged ineffectiveness of counsel in relating to certain of the due process violations asserted above, and second as to Hughes's alleged actual incompetency at trial.

2. Ineffective assistance of counsel with respect to competency issues

Hughes contends that his counsel was ineffective in a Sixth Amendment sense with respect to various aspects of the competency determination discussed above. (Pet. ¶ 140.) He asserts that counsel "failed to bring to the court's attention the facts and legal principles showing the inadequacy of the competency determination," failed to seek competency hearings at critical stages when he knew Hughes was not competent, and failed to properly develop and present to the court available evidence of incompetency. (Pet. ¶ 141.) Respondents assert that this claim of attorney ineffectiveness is procedurally defaulted for the same reasons as the prior claims discussed in this Report. (Ans. at 14-15.) However, as we find this to have been fairly presented to the state court, we consider it on the merits.[19]

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[19] On PCRA review, the state supreme court recognized that Hughes "contend[ed] that counsel was ineffective in failing to seek a competency hearing at each of the critical stages of trial and investigate, develop, and present available evidence of mental illness, brain damage, and incompetence." *Hughes-II*, 865 A.2d at 777. The supreme court noted that the PCRA court found the various issues raised by Hughes regarding the competency determination to have been previously litigated and therefore not reviewable on PCRA review. Although Hughes argued to the state supreme court that issues concerning the effectiveness of counsel were not among those previously litigated on direct appeal, the court declined to review the claims, apparently because it concluded that the attorney ineffectiveness claims were predicated on the prior competency determination, which the court had already upheld on direct appeal and as to which it did not believe that Hughes was entitled to further review. *Hughes-II*, 865 A.2d at 777-78.

We do not find this to bar consideration of this ineffectiveness claim. Several other judges in this district have refused to find a claim of ineffective assistance of counsel raised on PCRA review in situations such as this one procedurally defaulted. *See, e.g., Kinard v. Palakovich*, No. 05-2804, 2006 WL 3366168, *8 (E.D. Pa. Nov. 16, 2006) (Stengel, J.) (adopting R&R of Rice, M.J.). In addition, the Pennsylvania Supreme Court, subsequent to its decision in Hughes's PCRA appeal, came to the recognition that ineffective assistance claims are analytically distinct from an underlying substantive claim that counsel allegedly ineffectively failed to prove and should be treated separately on collateral review. In *Commonwealth v. Collins*, 888 A.2d 564, 572-73 (Pa. 2005), the court rejected the approach it had employed in *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994). *Peterkin* was the case cited by the court in *Hughes-II* for the proposition that Hughes "cannot (continued...)

We presume that the first aspect of this ineffectiveness challenge — based upon the "inadequacy of the competency determination" — alleges anew that Judge Latrone's competency finding on January 29, 1981 was based upon "inadequate and unreliable mental health evaluations," and/or that the court "fail[ed] to hear and give effect to evidence of incompetency," which we resolved above. Petitioner does not elaborate further.[20] We do not see how the first contention in this section of his petition entitles Hughes to any relief, for the reasons already set forth above.

His second contention regarding the deficient performance of counsel is that counsel "failed to seek a competency hearing at all at the critical stages identified above and throughout the proceedings (in which he knew Petitioner was not competent)." (Pet. ¶ 141.) This contention largely overlaps with that addressed in Section V.A.1.d, *supra*, rejecting his claims that the court erred in failing to inquire into his competency at certain "critical stages." Again, we do not see evidentiary support for this contention in the record or proffer. Counsel sought a competency hearing as the case was called for trial but was unable to convince the court that his client had become incompetent again. There is nothing in the record or the evidentiary proffer to suggest that, between the time Judge Latrone rendered his pre-trial competency determination and the jury returned its guilty verdict

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[19](...continued)
circumvent [the previously litigated] limitation [precluding review of competency claims raised on PCRA review] by asserting ineffective assistance of counsel." *Hughes-II,* 865 A.2d at 777. Finally, we note that, in light of the fact that trial counsel continued to represent Hughes on direct appeal to the state supreme court, Hughes did not have an opportunity to allege his trial counsel's ineffectiveness with respect to competency matters until PCRA review.

[20] It is unclear to us what Hughes means by this assertion. Counsel preserved in post-trial motions issues regarding the propriety of the competency determination made by Judge Latrone in light of the evidence before the court. Hughes does not identify what else a reasonable counsel would have done with respect to the competency determination made by Judge Latrone.

approximately six weeks later, Hughes's condition deteriorated in such a way as to cause a reasonably effective attorney to believe that renewing his motion for a competency determination might have resulted in a finding of incompetency.[21] Therefore, we cannot say that an attorney adhering to *Strickland*'s standards for performance would have sought a competency hearing at the "critical stages" Hughes identifies such that Attorney Tinari's failure to do so could be described as constitutionally deficient performance.[22]

Hughes's third contention is that counsel "failed to reasonably investigate, develop and present to the court the evidence of mental illness, brain damage and incompetency that was actually available." (Pet. ¶ 141.) We presume this claim to focus on counsel's conduct over the course of

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[21] The evidentiary proffer to which this section of Hughes's petition refers details unfortunate facts of Hughes's upbringing and home life. It does not, however, describe any deterioration in Hughes's condition during the course of the trial. (Pet. ¶¶ 70-85.) The only reference to Hughes's condition during the trial is the averment that "[f]amily members visited Petitioner before, during and after the trial, and found that he had a fixed irrational belief that he would be sent home to his grandmother if he could just tell the judge his story, with the actual outcome of the trial being irrelevant to his fate." (Pet. ¶ 85.) This does not reflect a change in Hughes's condition that would have warranted a new consideration of his competency.

[22] For the reasons provided in Section IV.A.1.d, *supra*, we no longer consider the transfer hearing, nor the penalty phase of the case, to be points at which a period of incompetency would have affected Hughes's due process rights with respect to the determination of his guilt. In addition, the district court (Katz, J.) has already determined that the failure of counsel — then Mead S. Spurio, Esquire — to have sought a competency hearing at the time of the March 10, 1980 transfer hearing did not prejudice Hughes. Judge Katz concluded that there was no reasonable probability that Hughes would have been found incompetent to stand trial in light of the findings of competency following two other hearings. He also found no prejudice to Hughes where there was no significant progress in his case from the March 10, 1980 date until the next proceeding in his case — on October 10, 1980, when he was found to be competent. *See* Mem. & Order, 9/25/07 (Doc. No. 34) at 15-18. Judge Katz's ruling effectively concluded any further consideration by us of Petitioner's ineffectiveness claim based upon the failure of Attorney Spurio, who represented Hughes at the March 10, 1980 transfer hearing before Judge Ribner, to advocate for an assessment of his client's competency at the time of that hearing.

two days during which Judge Latrone held the hearings regarding Hughes's competency as trial was nearing and the court decided the outstanding suppression motion. Hughes acknowledges that "[c]ounsel proffered some of the evidence of incompetency that family members would have provided if the court had allowed their testimony." (Pet. ¶ 143, referring to N.T. 1/28/81 at 16-17.) He identifies six areas in which counsel did not perform as effective counsel would: (1) in failing to adequately interview his family, which resulted in his not being in a position to proffer testimony that Hughes "had a long history of mental illness, being out of touch with reality, being unable to comprehend his environment, being unable to communicate with others[,] and believing he was specially protected from harm by magical forces;" (2) in failing to provide to Dr. Blumberg and the other testifying doctors the information available from family members regarding Hughes's history; (3) in failing to seek testing for brain damage; (4) in failing to "develop[] and present[] compelling expert testimony that Petitioner was incompetent"; and (5) in failing to "develop[] and present[] evidence showing why the evaluations of Drs. Saul and Camiel were inadequate and unreliable." (Pet. ¶¶ 143-44, and referring to Section V.D of the Petition.)

We cannot say that counsel's performance in these respects was deficient. With respect to the first contention, regarding the available testimony from family members as to the longevity of Hughes's mental problems, we note that the testimony of the family that Attorney Tinari did proffer was part of the basis for Judge Latrone's decision to pursue an expert evaluation of Hughes. Once experts entered the picture, however, it was clear that Judge Latrone was interested in their assessments of Hughes's condition at the time of trial, not at some point in the past. Therefore, we do not believe that a further evidentiary proffer as to their testimony would have affected Judge Latrone's decisionmaking. Furthermore, counsel presented the court with a recitation of and offered

records documenting Hughes's psychiatric treatment over the course of the previous year following his initial difficulties in interviewing Hughes, explaining to the court that Dr. Camiel recommended in April 1980 that Hughes be transferred to a psychiatric facility for hospitalization; that, despite taking medication, Hughes's speech in July 1980 was non-spontaneous and he was still complaining of occasional hallucinations as well as anxieties; and that, during visits by family members in November and December 1980 he was non-communicative. (N.T. 1/28/81 at 9-17.) Judge Latrone was clearly concerned, however, only with Hughes's *current* competency. (*See* N.T. 1/28/81 at 26 (ordering immediate examination "concerning his present competency to stand trial as of today and tomorrow").) Throughout the two days of hearings, Judge Latrone focused the testimony on the doctors' assessment of his present state and not on prior assessments. For example, on the second day of the hearing, Attorney Tinari attempted to elicit from Dr. Blumberg a statement as to the extent to which his opinion was based on the report of Hughes's earlier condition and treatment. The court, however, made it clear that it would not permit the focus to veer from Hughes's current condition. (N.T. 1/29/81 at 62.) In light of this approach by the court, we cannot say that the manner in which Attorney Tinari proceeded, and any inability on his part to highlight the history of Hughes's mental impairments, is attributable to constitutionally deficient performance or that it accounts for the court's competency finding.

Hughes next contends that counsel must be deemed ineffective for failing to provide Dr. Blumberg and the other evaluating psychiatrists with relevant information that Hughes's family could offer regarding his history. We do not believe that Hughes has met his burden to show that his attorney's performance in this respect was constitutionally deficient or prejudicial to him. We note that Dr. Blumberg had an opportunity to review "various medical evaluation records of Mr.

Hughes, to wit, the psychiatric evaluations." (N.T. 1/29/81 at 61.) Hughes has not demonstrated, however, that the opinion testimony of Dr. Blumberg or any of the other testifying psychiatric experts as to his competency to proceed to trial in and around January 28 and 29, 1981 would have been materially different as to have had a reasonable likelihood of affecting Judge Latrone's finding had they been given the particular information Hughes's family members indicate they were willing to provide at the relevant time.[23]

Hughes's third contention fails because he has not demonstrated that, in addition to everything else that Attorney Tinari did in terms of securing updated and additional psychiatric evaluations as to Hughes's competency following the October 22, 1980 pre-trial finding of competency by Judge Caesar, a reasonably effective attorney would have sought testing for brain damage. (Pet. ¶ 144.) He provides no basis upon which we could conclude that a reasonable attorney in 1980 would have believed that testing for brain damage — separate and apart from the various evaluations into Hughes's sanity and competency as well as the course of his treatment by prison psychiatrists and at the state hospital — might be useful for purposes of the competency assessment. His final two contentions essentially assert that counsel could have done better than Dr. Blumberg in terms of persuading the court of Hughes's incompetency by way of expert witness testimony and that he should have done a better job in his cross-examination of Drs. Saul and Camiel. We have reviewed the hearing transcript and do not find any deficiency in Attorney Tinari's

[23] Hughes's evidentiary proffer includes affidavits of a psychiatrist, Dr. Fox, and a psychologist, Dr. Fleming, given in 1996. It did not include any statement from any of the three psychiatrists who testified on January 28 and 29, 1981. *Cf. Appel v. Horn*, 250 F.3d 203, 206, 216 (3d Cir. 2001) (psychiatrist, on whose opinion court based finding of competence to waive counsel, testified at PCRA hearing that she would have made further inquiry when she evaluated defendant's competency had she been told of defendant's bizarre behavior).

performance in this respect that would meet the *Strickland* standard. In conclusion, we do not believe Hughes has demonstrated an entitlement to relief based on counsel's representation of him with respect to competency matters.

3. Actual incompetency

Hughes's final claim with respect to competency issues is that an evidentiary hearing in our Court would demonstrate that he actually was incompetent at the time of his 1981 trial. (Pet. ¶ 147.)[24] Respondents contend that the state courts' finding that Hughes was competent to stand trial following hearings in the state court is a factual determination that is binding in federal court and which we cannot consider invalid under AEDPA's deferential standard of review. (Ans. at 21.) In addition, Respondents contend that the state supreme court decision rejecting Hughes's claim that he was tried while incompetent does not constitute an unreasonable application of clearly established federal law. (Ans. at 25.)

As our court of appeals has held, "[c]ompetency is a state court factual finding that, if supported by the record, is presumed correct" under 28 U.S.C. § 2254(e)(1) unless the petitioner can rebut "the presumption of correctness by clear and convincing evidence." *Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007) (citing *Thompson v. Keohane*, 516 U.S. 99, 111 (1995) and *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*)); 28 U.S.C. § 2254(e)(1). The federal court is not free to substitute its views for the findings of the state court. Rather, to obtain relief on such a claim, the petitioner must demonstrate that the state court action "was based on an unreasonable determination of the facts" or that it otherwise "involved an unreasonable application of[] clearly

[24] His petition includes a lengthy evidentiary proffer relating to this issue. (Pet. ¶¶ 34-93.)

established Federal law." 28 U.S.C. § 2254(d)(2), (d)(1).[25] We do not believe Hughes is entitled to relief on this claim under these standards.

As alluded to above and pursuant to longstanding United States Supreme Court precedent, a defendant is competent to stand trial if he: (1) "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "has a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Dusky v. United States*, 326 U.S. 402 (1960) (*per curiam*). In analyzing Hughes's case, the Pennsylvania Supreme Court applied this standard and cited sufficient evidentiary support in the way of expert testimony for the conclusion of the trial court on January 29, 1981 — as trial was imminent and competency critical — that Hughes was, in fact, competent. *See Hughes-I*, 555 A.2d at 1270-71 (citing *Dusky* and finding testimony of Drs. Camiel and Saul sufficient evidence to support trial court finding and "the conclusion that [Hughes's] mental disorder did not impair his competence to stand trial"). *See also Commonwealth v. Hughes*, Nos. 1788, 1689, 1690, 1692 Jan. Term 1980, slip opin. at 14-18 (Phila. Ct. Comm. Pl. Nov. 17, 1986) (trial court opinion citing N.T. 22-26 (colloquy by court), 1342-1522 (Hughes's trial testimony)) [Ans. at Ex. A].

With respect to his claim of "actual incompetency," Hughes invites us to hold an evidentiary hearing at which additional evidence pertaining to his mental health would be presented. (Pet. ¶ 147.) His only explanation of his claim of actual incompetency is that his proffered mental health evidence, described elsewhere in his petition, would demonstrate that he was tried while actually

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[25] Section 2254(d)(1) also refers to a state court determination "contrary to" clearly established federal law. In this case, however, the state court cited the appropriate federal standard. *See Hughes-I*, 555 A.2d at 1270 (citing *Dusky v. United States*, 326 U.S. 402 (1960)). Therefore, we look only for an objectively unreasonable application of that standard to the facts of this case.

incompetent, in violation of his due process rights. (Pet. ¶ 147 (referring to section of petition encompassing pp. 5-25).) He contends that:

> There are numerous indicia of, and much evidence for, his incompetency during those proceedings, including his organic brain damage; his schizophrenia; his other mental problems and cognitive impairments; his history of bizarre behavior and inability to function; his family's history of bizarre behavior, mental illness and incompetency; his traumatic childhood and the deficits it caused; his impaired intelligence; his concreteness and lack of ability to think abstractly; his impaired reasoning ability; his impaired memory and attention; his impaired ability to communicate; his lack of insight into his condition; his poor judgment; his tendency to deteriorate mentally under stressful conditions and when not in a therapeutic environment; his impaired cognitive capacity; the effects of the drugs he was administered throughout the proceedings; his lack of contact with reality; defense counsel's explanations that he was not rational, was unable to rationally communicate and incompetent; his family's descriptions of his inability to think rationally and assist in the defense; and the other effects of his schizophrenia and brain damage, such as his delusional beliefs about the trial process, including the delusional belief that it did not matter what happened in court and that he only had to tell the court his story and he could go home; and pre-trial and post-trial findings of incompetency.

(Pet. ¶ 92.) This argument, however, fails to take into account that intensive mental health treatment appeared to have helped to stabilize Hughes and enabled him to regain competency in October 1980 and, based upon the testimony of two of the three experts and in the opinion of Judge Latrone, to have resumed, if not maintained, his competency at the start of trial in January 1981. Hughes's paranoid schizophrenia appeared to be controlled by medication during trial. The record does not reflect any party having memorialized any unusual behavior exhibited by Hughes during the guilt phase of his case. While his examination on both direct and cross often involved leading questions requiring nothing more than short answers, the transcript does not reflect any inability to consult with his lawyer with a reasonable degree of rational understanding or to lack an understanding of the

proceedings against him. Although Attorney Tinari had raised the competency concern in late January 1981, causing Judge Latrone to defer the start of trial and to order as many as three mental health evaluations conducted, he did not renew his concerns or suggest that Hughes was decompensating as the trial wore on, including when he took the stand beginning on March 16, 1981. We also note that in the three days of Hughes's testimony, there was nothing apparent in the record to suggest that there was any further cause for concern. *See also* N.T. 3/18/81 at 1522-23 (no concerns expressed at sidebar or chambers conference following Hughes's testimony).[26]

We are unable to conclude that Hughes's proffer of evidence gives rise to "clear and convincing evidence" that the state court incorrectly found him competent on January 29, 1981 or that his trial from his arraignment on February 26 until the verdict was returned on March 23, 1981 took place while he was incompetent. Accordingly, the state courts' rejection of the portion of his due process claim in which he asserted "actual incompetency" does not reflect an unreasonable determination of the facts, nor an unreasonable application of the due process standards as determined by the United States Supreme Court. In conclusion, we find that none of the due process or ineffectiveness claims that Hughes raises in the first ground of his petition warrant habeas relief.

B. Ineffective assistance of counsel as to mental health defenses

The second claim upon which Hughes seeks federal habeas relief is that he was deprived of the assistance of counsel guaranteed by the Sixth Amendment when Attorney Tinari did not

[26] Hughes also testified on February 11, 1981 at the suppression hearing. *See* N.T. 2/11/81 at 2.721-2.736. Again, the notes of testimony do not reflect that Hughes was then experiencing any symptoms of schizophrenia or any effects of whatever organic brain damage he then suffered that interfered with his ability to consult with his attorney or his understanding of the proceedings against him.

investigate, develop, and present mental health defenses in the guilt phase of trial. He asserts that counsel's failure to present these defenses was deficient in light of both what Tinari knew about Hughes's background and mental disturbances, as well as "the overwhelming evidence that Petitioner was the assailant." (Pet. ¶ 152.) He contends that this deficient performance prejudiced him because there was a reasonable probability that, had proffered evidence from "records, family members, and expert mental health evaluations" been presented, he would have limited his culpability on the grounds of insanity or diminished capacity. (Pet. ¶¶ 152-53.) Respondents contend that the state court decision rejecting this claim is neither incorrect nor unreasonable and that 28 U.S.C. § 2254(d) therefore precludes relief. (Ans. at 32.)

As we set forth in considerable more detail below, we find that § 2254(d) does not restrict this Court's authority under 28 U.S.C. § 2254(a) to grant habeas relief on this claim. The burden, however, remains with Hughes to demonstrate that he suffered a violation of his Sixth Amendment right to counsel. Having permitted Hughes to develop the evidentiary record and subjecting the claim to *de novo* review, we find that he does not meet his burden. This section of our Report describes the nature of the defenses that Hughes alleges should have been raised; the rationale provided by the Pennsylvania Supreme Court when it rejected this claim on the merits in the PCRA appeal; this Court's determination that the state court's adjudication of this claim flowed from an unreasonable application of *Strickland*; our findings from the evidentiary hearing; and our analysis of the deficient performance and prejudice prongs of *Strickland*.

1. The state court adjudication of the IAC claim

Hughes asserted on PCRA review that Tinari performed deficiently in failing to investigate, develop, and present evidence supporting either a diminished capacity "and/or" an insanity defense.

The Pennsylvania Supreme Court affirmed the conclusion of the PCRA court that counsel's actions in not presenting a defense of insanity or diminished capacity reflected strategic decisions and constitutionally adequate representation. Although no evidentiary hearing had been held to establish the basis for counsel's decisionmaking and Hughes did not otherwise provide any evidence as to counsel's strategic process, the court noted that from its consideration of the record that Tinari was aware that some sort of mental state defense might be appropriate. *See Hughes-II*, 865 A.2d at 788 n.30 (observing that Tinari indicated to court during competency hearing that mental health expert retained for competency issue would also examine Hughes for potential defense). The high court noted that both defenses acknowledge commission of the act but maintain either the absence of legal culpability (insanity) due to mental infirmity or that a lesser degree of culpability is warranted because of the defendant's inability to form the specific intent to kill (diminished capacity). *Id.* at 788. The court continued:

> Where a defendant has testified at trial and has denied having committed a crime, this Court has declined to deem counsel ineffective for failing to present a defense that would have been in conflict with his client's own testimony. *Commonwealth v. Paolello*, 542 Pa. 47, 78-79, 665 A.2d 439, 455 (1995); *see Cross*, 535 Pa. at 43-44, 634 A.2d at 175-76. Here, as Appellant specifically denied having committed the offenses, under this Court's precedent, counsel cannot be held ineffective for failing to present an inconsistent defense.

Id.

In considering the state court process as it pertains to any constitutional deficiency of Tinari's strategic decisions and prejudice to Petitioner, we must examine what options Tinari had and what evidence would have been required and available to support these options. Several precepts of Pennsylvania criminal law are pertinent to this analysis.

The first is that in order to obtain a conviction of first-degree murder, the Commonwealth bore the burden of proof that Hughes's killing of Rochelle Graham was "intentional," which is defined as "killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." *See* 18 Pa. Cons. Stat. § 2502(a), (d). At the time of Hughes's trial, Pennsylvania courts permitted defendants to assert what has been termed a "diminished capacity defense." This defense is built upon evidence that the defendant lacked the mental capacity to carry out a plan or design and seeks to undermine the state's proof of specific intent to kill as demonstrated by deliberation and premeditation. A defendant who offers evidence under the theory of diminished capacity "concedes general criminal liability" but challenges his capacity to possess the state of mind for the particular degree of the crime charged. *See Commonwealth v. Zettlemoyer*, 454 A.2d 937, 943 (Pa. 1982); *Commonwealth v. Walzack*, 360 A.2d 914, 919-20 (Pa. 1976). *See also Rock v. Zimmerman*, 959 F.2d 1237, 1245 (3d Cir. 1992) (reviewing Pennsylvania law).

In addition, Pennsylvania courts have long recognized insanity as a defense to criminal charges, relieving the defendant of all criminal liability. The *M'Naghten* test, which was codified subsequent to Hughes's trial at 18 Pa. Cons. Stat. § 315, provides that a person is legally insane if either: (a) at the time of committing the act, he was laboring under a defect of reason from the disease of the mind as not to know the nature and quality of the act he was doing; or (b) if he *did* know the nature and quality of the act, he did *not* know that what he was doing was wrong. *See Commonwealth v. Woodhouse*, 164 A.2d 98, 103 (Pa. 1960).

As Judge Katz explained in his Memorandum & Opinion permitting an evidentiary hearing to go forward as to this claim, "[t]he mere fact that Petitioner testified at trial as he did is insufficient for the court to determine if Petitioner's trial counsel failed to investigate, develop or present mental

health defenses, and if so, whether that failure was a sound trial strategy, or even part of a strategy at all." (Doc. No. 34 at 20-21.) He also noted that, while Pennsylvania law would preclude the presentation of both an innocence defense and a diminished capacity defense, it would allow presentation of innocence and insanity concurrently, even if "[t]he fact that evidence of one would be inconsistent with the other 'is an inevitable consequence of the decision to rely on' both." (*Id.* at 21-22 (quoting *Commonwealth v. Jermyn*, 533 A.2d 74, 83 (Pa. 1987).) Finally, the Court noted that it could not assume that Petitioner would "still have testified on his own behalf, [or] that he would have told the same tale that he did at trial," had counsel reasonably investigated other viable defenses before trial. (*Id.* at 22-23 (quoting *Coss v. Lackawanna County Dist. Attorney*, 204 F.3d 453, 463 (3d Cir. 2000) (*en banc*)).)

In light of Judge Katz's reasoning in this Court's earlier decision, we feel constrained to conclude that the state court did not have a proper basis to reject the claim on the record before it at the time, and that it unreasonably applied *Strickland*, when it presumed that Hughes would still have testified that he had nothing to do with the killing of Graham had Tinari developed and been in a position to present either an insanity or a diminished capacity defense. While *Strickland* requires that review of counsel's strategic decisions be done with deference, the state court lacked any basis on which to rest its presumption that presentation of a properly investigated mental state defense would have required that Tinari present inconsistent theories to the jury. This is particularly so given that the lower court had not allowed Hughes to develop the record with an evidentiary hearing to ascertain either counsel's strategic process and investigation or to understand the circumstances under which Hughes was put on the stand to deny any involvement in the crime. Having determined that the rationale provided by the state court for its rejection of Petitioner's ineffectiveness claim

applied *Strickland* unreasonably, we consider how the expansion of the evidentiary record impacts Hughes's claim for relief.

2. The expanded record from the evidentiary hearing

Petitioner presented seven witnesses at the hearing: four family members, Attorney Tinari, and two experts. Hughes himself did not testify. Respondents presented a rebuttal expert and also called the former assistant district attorney who handled the prosecution of Hughes for the Graham offenses in 1980 and 1981 regarding his observations of Petitioner at court appearances during that period. The many exhibits introduced at the hearing included documentation of police investigations in three different rapes attributed to Hughes, his mental health history following his arrest and throughout his incarceration, the contents of Tinari's file, and the reports of various experts prepared in relation to this litigation.

a. Testimony of Hughes's family members

Petitioner presented the testimony of four family members at the hearing: Teresa Price, Yvonne Williams, Linda King, and Darrell Hughes. With the exception of Ms. Price, from whom no affidavit had been taken in the state court proceedings, the testimony of these witnesses was largely consistent with what was contained in their 1996 affidavits presented to the state court on PCRA review as it concerned Hughes's childhood, family history of mental illness, their availability to have provided Tinari with information on these subjects leading up to the time of trial, and their contention that Tinari did not inquire of them about Hughes's background.[27] Apart from Ms. Price,

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[27] The evidentiary proffer to the state court also included affidavits from brother Gordon Hughes, maternal uncle Morris Hawthorne, and mother Rebecca Bunn. Mr. Hawthorne had provided an affidavit to the state court that touched upon Hughes's interrogation and his condition during visits (continued...)

who claimed she observed Hughes in an "agitated" state on the day the news reported on the fire in the house in which Graham was found, none of the family members attested to any interactions that they had with or observations of Hughes on the day of the Graham murder.[28]

Those family members who had interactions with Tinari pre-trial testified to Tinari as being too hurried to elicit from them background information that would have warranted further forensic psychiatric inquiry and assertion of mental health defenses. Attorney Tinari's recollection was that the family was "aloof" when he spoke with them, and that "they were not that helpful in terms of how I had to deal with the defense." (N.T. 2/16/10 at 95.) Nonetheless, his billing records reflect many hours of meetings with Hughes's family. (*See* Pet'r Hrg. Ex. D33 (nine entries documenting 23 hours billed for "out of court" time in "interview with defendant's family" or "telephone conversation with defendant's family" in February, April, May, June, August, and September 1980 and January 1981).

One of Hughes's aunts, Ms. Williams, testified that she told Tinari prior to trial that Hughes

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[27](...continued)
at the jail leading up to trial. He had been identified as a potential witness at the federal evidentiary hearing but was not ultimately called. Ms. Bunn had passed away before the federal hearing, as had Mary Hawthorne, the grandmother who was Hughes's legal guardian at the time of his arrest and with whom Hughes had lived for portions of his childhood.

[28] For example, the affidavit of Morris Hawthorne, an uncle, presented to the state court on PCRA review referred to circumstances of the interrogation and confession of Hughes and his mental state then. It also touched upon Hughes's contention that a man named "Otis" had molested him and that he believed "Otis" had also molested Graham. Aff. of Morris Hawthorne, ¶ 15 (appended to PCRA Pet.). Hughes told police that it was when he saw "Otis" outside of the house after setting the fire upstairs that he decided to flee from the back of the house to avoid being seen.

Morris Hawthorne's affidavit offered no first-hand knowledge about Hughes's behavior on March 1, 1979, the day Graham disappeared and was found dead in the abandoned house. *Cf.* N.T. 3/6/81 at 557 (trial testimony of Ophelia Moore, Graham's aunt, that Hughes came to her house to offer his condolences that evening).

told her that he did not kill Graham and that he had only confessed because the police told him that if he did so, he could go home. (N.T. 2/16/10 at 70-71.) Written reports found in Tinari's files reflecting a January 15, 1980 interview of Morris Hawthorne and an April 22, 1980 interview of grandmother Mary Hawthorne and aunt Yvonne Williams also suggest that the family's position was that Hughes had not committed the crimes and that the confession was coerced. *See* Resp'ts Hrg. Ex. 14 (file memo by a Carol A. Black dated Apr. 20, 1980 reflecting interview of Ms. Hawthorne and Ms. Williams, including their characterization of Kevin as "quiet, introspective and associated mostly with a younger crowd" and "quite kind and considerate"; reporting that Kevin arrived at school by 2nd period on Mar. 1, 1979; and stating that there was another boy in neighborhood also named "Peanut"); Resp'ts Hrg. Ex. 13 (file memo of interview of Mr. Hawthorne bearing date of Jan. 15, 1980 describing length of interrogations and police tactics).

b. Testimony of experts

Hughes presented the testimony of two expert witnesses: psychiatrist Robert A. Fox, Jr., M.D., who had provided an affidavit in conjunction with the PCRA proceedings[29] and Barry Crown, Ph.D., a neuropsychologist who offered testimony similar in scope to that addressed in an affidavit proffered in the PCRA proceedings by Patricia Fleming, a licensed clinical psychologist and neuropsychologist, based on his evaluation of Hughes in 2008 and his review of other records.[30]

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[29] That affidavit touched upon both testimony that could have been offered at trial in 1981 concerning mental state defenses but also issues relating to whether Hughes was competent when declared to be so on January 29, 1981 and what evidence could have been presented as mental health mitigating evidence in March 1981.

[30] Dr. Fleming was ultimately unable to participate in the hearing we scheduled due to ill health. Petitioner replaced her with Dr. Crown, who examined Hughes in 2008.

Respondents offered the testimony of John O'Brien, M.D., to demonstrate the expert rebuttal case that the Commonwealth could have presented at trial had Petitioner pursued a defense of either diminished capacity or insanity. The expert testimony presented at the hearing shed light on the state of Hughes's mental health over an extended period of time. The three experts evaluated or examined Hughes long after the 1979 offense and, relying upon various forensic sources such as reports of mental health professionals who examined Hughes both prior to trial and thereafter, the family member affidavits describing his background, as well as school and social service records, offered opinions as to the impairments from which he likely suffered at the time of the Graham killing on March 1, 1979.

Psychiatrist Dr. Fox diagnosed Hughes with schizophrenia (paranoid type), post-traumatic stress disorder, and organic brain impairment. (N.T. 2/17/10 at 63.) Of relevance to the insanity defense, he opined that these infirmities were present in 1979 and prevented Hughes from knowing the nature and quality of his acts and from being able to distinguish between right and wrong. Of relevance to the diminished capacity defense to the first degree murder accusation, he also opined that these disorders prevented Hughes from having the capacity to formulate the specific intent to kill. (*Id.* at 164-67.) He opined that Hughes's schizophrenia was "full-blown" at the time of the offense. (*Id.* at 161.) He based this opinion upon family members' descriptions of "prodromal symptoms of schizophrenia going back into early childhood" and Hughes's statement to the police from January 1980 that attributed the choking of Rochelle Graham and the setting of the fire to command hallucinations or "voices" that he heard that "told him" to do these things. Dr. Fox characterized this statement as "very firm evidence of an individual who is then experiencing a full-blown psychotic illness." (*Id.* at 163.) Dr. Fox also relied upon the pre-trial psychological and

psychiatric reports beginning in January 1980 and continuing through the January 1981 competency hearings, which, although differing in their diagnoses, "all describe an individual with psychotic symptomotology." (*Id.* at 164.) He believed that the three illnesses contributed to Hughes not knowing the nature and quality of his acts when he killed Graham because "at that time he was operating under a psychotic delusion at the behest of a command hallucination that he was hearing to kill Rochelle Graham" and that "because of his schizophrenia as well as because of his posttraumatic stress disorder and cognitive impairment, his brain damage, [] he would respond by following the command." (*Id.* at 165.)[31]

Psychologist Dr. Crown testified that the battery of neuropsychological tests of brain function that he conducted as part of his 2008 evaluation of Hughes, along with the other materials reviewed by Dr. Fox as well, led him to conclude that, at the time of the incident, Hughes suffered from organic brain damage and was experiencing psychotic symptomatology of schizophrenia. He testified that Hughes was significantly impaired in his ability to organize, process, and express information. (N.T. 2/19/10 at 16.) Dr. Crown opined that Hughes choked and killed Graham because he was experiencing a command hallucination, which his thought disorder led him to accept as real. (*Id.* at 36.) He, too, opined that Hughes did not know the nature or quality "of the act he was doing" — presumably the fatal choking of Graham — and did not know that what he was doing was

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[31] While Dr. Fox testified that Hughes's rape of Graham triggered PTSD symptoms that reduced his ability to withstand command hallucinations to choke and kill Graham, the precipitous act of rape could not be explained by Dr. Fox as a result of a psychotic episode arising from schizophrenia, PTSD, nor any other occurrence. Hughes's statement to the police had not indicated that "something told him" to rape Graham. Dr. Fox also acknowledged that he believed Hughes knew what he was doing when he raped Graham and that there was no viable mental state defense to the rape. (N.T. 2/22/10 at 45-46.)

wrong. He also opined that Hughes's mental illness, disease, and defect prevented him from formulating the specific intent to kill at the time of the murder. (*Id.* at 36-37.)

Psychiatrist Dr. O'Brien testified that Hughes's current diagnoses are schizoaffective disorder and cognitive disorder not otherwise specified. (N.T. 2/23/10 at 39.) In light of the detail and specificity reflected in the statement that Hughes gave to the police in January 1980 as well as the intentional acts it ascribed to his conduct on March 1, 1979, including approaching Graham with the intention of raping her, Dr. O'Brien concluded that the record lacked sufficient evidence that Hughes suffered from a diminished capacity to form the specific intent to kill nor that he was insane in March 1979. Rather, he opined that Hughes was "not prominently symptomatic from a psychiatric perspective at the time of the crime" and that while Hughes might have experienced an auditory hallucination, that did not yet warrant a diagnosis of schizophrenia. (*Id.* at 31.)[32] He found Hughes's statement to police to "rule out" an insanity defense because Hughes "clearly demonstrated an ability to appreciate the nature and quality of his acts," notwithstanding his reference to "being told at various points to do different things," in light of his change of plan in how he would leave the building after setting the fire when he saw reason to fear detection. (*Id.* at 26-27.) While conceding that he "[did]n't know what to make of" the statement "something told me to" choke Graham and to set the fire, he found no other indicia in Hughes's statement to police of the disorganized thinking or paranoia that Hughes displayed later. (*Id.* at 28-29.) Also, even accepting that the statement did reflect an auditory hallucination, Dr. O'Brien did not find that it suggested that Hughes could not

[32] As to when the schizophrenia developed, Dr. O'Brien noted from his experience that the stress of incarceration can, and often does, bring out a psychiatric illness in someone who had proclivities toward psychiatric illness. (N.T. 2/23/10 at 33.)

appreciate the wrongfulness of his acts. (*Id.* at 29.)

c. Testimony of Tinari concerning investigation and trial strategy

The evidentiary hearing did not uncover the kind of clarity we would have hoped for with respect to the strategic decision-making process that Tinari undertook with Hughes and his family leading up to trial. This was due in large part to the passage of time since the trial and gaps in Tinari's recollection of significant details. He had no specific recollection, for example, as to whether Hughes had taken the stand at trial but did recall, with confidence and with clarity, that Hughes asserted his innocence. (*See* N.T. 2/16/10 at 93 (recalling that they spoke of Hughes's innocence "on many occasions" and that Hughes "absolutely" told Tinari that he was innocent).) He recalled that his "strategy was to get an acquittal" and that he "was aggressive in every aspect trying to establish … that Kevin was innocent of the crime." (*Id*. at 97.) When asked to defend his choice of strategy, he responded that he employed the strategy he did because he believed it was the best one he could present. He could not recall whether he discussed with Hughes an insanity or diminished capacity defense. (*Id.* at 104.) He could not recall if he received an expert opinion from Dr. Blumberg as to whether there might have been a viable mental health defense to be made, although he believes he would have presented an insanity defense over a diminished capacity defense and that he believed that "one of the things that we wanted to try to establish" during the competency hearings was "the issue of whether or not [Hughes] was able to understand right or wrong at the time of the commission of the act." (*Id.* at 98-99, 115.) He appreciated, however, that these defenses required the defendant to admit to committing the act, which carried risks with it. (*Id.* at 99-100.) He explained that the consideration of a mental defense — whether Hughes "was mentally stable at the time of the commission of the act" (*id.* at 114) — was "intermixed" with the competency

consideration:

> In our arguments before the Court, the issue of competency became major at some – at all points. And the issue of whether or not he was able to understand right or wrong at the time of the commission of the act was something that didn't arise during the competency hearings, but certainly during the course of my thinking, that was one of the things that we wanted to try to establish. Was he mentally alert and had the ability to distinguish between right and wrong. And at some point in time, we came to the conclusion that he could do that even though he was not able to be – at one point, he was not competent to stand trial, the medication stabilized him. Then he became competent. And then we went to trial.

(*Id.* at 115.)

3. Analysis of assistance of counsel

a. Investigation

Tinari did not investigate whether a diminished capacity defense would be an appropriate strategy in his representation of Hughes, nor is there any documentation in the record that he followed through on suggestions that he would consult with a mental health expert as to the viability of any mental health defenses in the guilt phase of trial. As became apparent within a few months of Tinari entering his appearance on behalf of Hughes, however, his client was showing signs of mental deficiencies and what was being described as hysteria or psychosis in the prison and then hospital environment. The question of possible mental state defenses certainly warranted investigation. Petitioner has made a strong case that he did not receive the investigation from Tinari that would be expected of counsel under the Sixth Amendment in a capital case such as this one in 1980 and 1981.

b. Trial strategy

Notwithstanding this deficiency, however, there were sound reasons for counsel not to take

the risk that either an insanity or diminished capacity defense would entail. First, the expert psychiatric evidence that might have been available would not have represented conclusive, uncontested evidence that Hughes suffered from a mental disease or defect on March 1, 1979 and that this disease either prevented him from knowing the nature and quality of the act he was doing, prevented him from knowing that what he was doing was wrong, or deprived him of the mental capacity to premeditate and deliberately carry out a plan or design to kill Rochelle Graham. Second, there was much evidence available in rebuttal to undermine the notion that Hughes suffered from these failings at the time of the crime or that an overwhelming command hallucination accounted for his conduct, particularly where at least certain aspects of the conduct for which he was charged, e.g., the sexual offenses that preceded the strangulation of Graham, were not explained away by his experts as responses to command hallucinations. (*See, e.g.,* N.T. 2/22/10 at 45-46 (concession by Dr. Fox that Hughes committed act of rape knowing that it was wrong and not pursuant to command hallucination).) Moreover, even if the Commonwealth were unable to meet its burden for the first-degree murder charge due to insufficient evidence of Hughes's specific intent to kill, a concession that Hughes committed the act would open the door to the Commonwealth arguing that a second-degree murder conviction was appropriate for a homicide that occurred while Hughes was engaged in the perpetration of a felony, such as rape or involuntary deviate sexual intercourse. That conviction would carry the same sentence of life imprisonment that Hughes is now serving, even if it would have spared him of the risk of the capital sentence that he endured for many years.

It is also the case that the strategy employed by Tinari was consistent with his client's repeated assertions to him that he was innocent. It enabled Tinari to argue that the Commonwealth had not met its burden to prove that Hughes committed the offenses against Graham because young

Maria, identifying him in the later attack, was not a reliable witness and because Hughes's confession to police in January 1980 was not credible. In support of this theory, Tinari could point to Hughes's mental limitations and poor language abilities, deficiencies which were heightened by a lengthy interrogation conducted by a police force determined to find someone whom they could hold responsible for the Graham killing.

We have also considered the question of whether Tinari would have had the support of his client and, given Hughes's age and precarious mental health condition, the approval of Hughes's family, in taking the risk of asserting a defense that acknowledged commission of the offense. While only one family member at the evidentiary hearing would even acknowledge that she had spoken with Hughes about whether he committed the offense — and testified that he denied it — Hughes himself never acknowledged it outside of his confession to the police that followed upon a series of lengthy interrogations and administration of a lie detector test. (*See also* N.T. 2/22/10 at 18 (Dr. Fox's testimony that "in the two extended interviews that [he] had with [Hughes], he adamantly denied the acts").) Tinari testified at the evidentiary hearing that he and Hughes spoke of his "innocence" "on many occasions" and that Hughes had "absolutely" told Tinari that he was innocent of the crime. (N.T. 2/16/10 at 93.) It is difficult to imagine that Hughes could have been persuaded to concede that he committed the acts and testify not to his innocence but to voices he heard that told him to kill Graham after he had abducted and raped her. *See also Muff v. Dragovich*, 310 Fed. Appx. 522, 525 (3d Cir. 2009) (non-precedential) (finding that counsel's strategy to argue death was accidental, consistent with client's account of event and in hopes of achieving outright acquittal, was not unreasonable and that "it might have been objectively unreasonable for counsel to have . . . conced[d] guilt on a lesser charge despite [the client's] protestations to the contrary"); *Lewis v. Horn*,

581 F.3d 92, 108 (3d Cir. 2009) (client not prejudiced by failure to present self-defense argument in addition to or instead of alibi defense where client had consistently asserted only alibi defense and facts contradicted self-defense theory).

Neither Hughes nor any other witness testified as to any conversation between attorney and client regarding mental state defenses. We have serious doubts, however, that a family that Tinari described as "aloof" (*see* N.T. 2/16/10 at 95) would have supported efforts to establish an insanity or diminished capacity approach on behalf of Hughes in early 1981, as it would have required them to air their family's sordid history of sexual and physical abuse and neglect in open court in what was a high-publicity case. Given that Hughes's insistence on his innocence was memorable to Tinari even after 30 years, and given the absence of any evidence from Petitioner suggesting that he or his family desired that a mental state defense be presented at the 1981 trial, we find that Tinari had no encouragement from his client or the family to present a mental state defense along the lines of that proffered by Petitioner in these proceedings and that there is a reasonable probability that they would not have authorized him to try to present such a defense.

c. Prejudice

One of the benefits of the strategy that Tinari chose was that it was the one his client believed in. Without determining whether this issue can be resolved neatly on deficient performance grounds, we can confidently state, for the reasons set forth below, that Hughes has not met his burden to show that he was prejudiced by the fact that the jury did not hear the proffered evidence offered by Respondents.[33]

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[33] As we assess in this Report whether Tinari can be deemed to have performed in a constitutionally (continued...)

Apart from the expert testimony given, the 2010 hearing shed considerable light on evidence that was already available concerning Hughes's make-up and behavior. This includes Hughes' school records, describing Hughes as the "ring leader of a group of boys" who was suspended from school for "hanging out near the girls' bathroom"(*see* Resp'ts Hrg. Ex. R29 at 2)[34]; his juvenile records documenting his continued denial of responsibility for rape of eleven-year-old "Dorothy" in 1976, even in court-ordered therapy sessions (*id.* at 4); and the 1974 report of a California social worker particularly indicating that among Rebecca Bunn's children, Kevin Hughes already "had a lot of street knowledge and probably needs to be watched carefully in order to be prevented from falling under bad influences." (*See* Pet'r Hrg. Ex. D23 at 38.) Unlike the portrait painted by family members beginning with their affidavits in 1996, the picture that the contemporaneous records paint of Hughes prior to his pre-trial detention beginning in January 1980 is not one of someone commanded by voices but of someone with grossly anti-social tendencies, particularly in the sexual arena, and perhaps arising from the dysfunctional, aggressive, and abusive family environment, who

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[33](...continued)
deficient manner in not pursuing a mental state defense, we necessarily also have to consider whether, had other avenues been adequately investigated, they would have appeared more favorable to him than the innocence strategy he employed. This analysis is intermingled with the question of whether Hughes was prejudiced by this alleged deficient performance by Tinari. That is, had Tinari presented to the jury the available evidence of diminished capacity and/or insanity as was presented at the evidentiary hearing, is there a reasonable probability that the outcome would have been different, i.e., that Hughes would not have been convicted of first degree murder? Whether considered as an evaluation of Tinari's strategic choices or focusing purely upon the question of prejudice to Hughes, we conclude that Hughes does not meet this burden under *Strickland* to demonstrate that he was deprived of the counsel guaranteed by the Sixth Amendment.

[34] This Presentence Report prepared by the Court of Common Pleas probation department dated February 22, 1982 purports to summarize the contents of Hughes's school file and juvenile file, the latter of which was no longer available for these proceedings but which appears to have been available to the prosecutor and defense at the time of Hughes's 1981 trial.

minimizes the harm that he inflicts upon others and who fails to accept responsibility for his actions.

This evidence undermines the notion, in our assessment of this as a *Strickland* claim, that there would have been a reasonable probability that the jury would not have convicted Hughes of first-degree murder had Tinari presented even the strongest possible case for insanity or diminished capacity that his current counsel present today. While Petitioner's experts presented their opinions with the force of conviction, that armor was not without its chinks. Dr. Fox, for example, conceded on cross-examination that Hughes's commission of three rapes depicted a pattern of behavior that would vitiate any mental health defense as to the charge of *rape* of Graham. (N.T. 2/22/10 at 45-46.) A similar pattern, of course, was present as to the act of killing: progressing from Hughes's threat to Dorothy in 1976 that he would kill her if she told anyone, to his successful killing of Graham in March 1979, to his choking of Maria into a state of unconsciousness (and presumably apparent death) in January 1980. (*Id.* at 51-52 (concession of Dr. Fox that "there is a pattern there as well").) This circumstance would seem to provide a very different account and to undermine Dr. Fox's own testimony, offered in rather conclusory fashion, that when Hughes strangled Graham on March 1, 1979 he did so without intending to kill her and not knowing either what he was doing or that what he was doing was wrong, an opinion based only upon Hughes's psychological profile and the influence of a supposed command hallucination to kill. Dr. Fox's testimony also failed to provide any excuse for the commission of the sexual offenses against Graham.

While Dr. Crown clung to his opinions more strongly, they were not particularly satisfying. He opined that all of Hughes's actions relative to Graham were "crazy, instinctual" and posited, based on his forensic diagnosis of Hughes as having schizophrenia on March 1, 1979, that there must have been some sort of "trigger" that set off Hughes's psychotic state that morning and accounts for

his actions, from the abduction of Graham through the arson. His sweeping conclusions seemed based upon little actual evidence, other than heavy reliance upon Hughes's subsequent explanation that was interpreted as an auditory hallucination. We have serious doubts that a jury who heard this in 1981 would have been persuaded by Dr. Crown's speculative testimony regarding a manifestation of psychosis from an unidentified trigger that Hughes met Pennsylvania's standards for diminished capacity or insanity when he raped and killed Graham.

As became apparent in the hearing, one of the most important factual components for the opinions of Petitioner's experts as to the availability of an insanity or diminished capacity defense was Hughes's statement to police well after the fact — in January 1980 — that after luring Graham to the abandoned house on March 1, 1979 and raping her, he killed her because "something told me to do it." It is this statement — interpreted as a description of a command hallucination, and coupled with information from Hughes' childhood and family history — that enabled Drs. Fox and Crown to diagnose Hughes with schizophrenia as of March 1, 1979. But that entire diagnostic structure crumbles if the "something told me to do it" statement was not a report of an auditory hallucination to kill but rather a turn of speech in an attempt to account in some manner for what cannot be explained in any other satisfactory way, for he had sexually assaulted and then strangled a young girl who could not have threatened him in any way other than as a potential witness to his crimes against her.

Respondents credibly challenged Petitioner's premise that he was actively schizophrenic in March 1979 when he killed Graham. The record does not document psychosis prior to that time nor subsequent to that time until April 1980 apart from Hughes's reference in January 1980 to "something" telling him to kill Graham, which Respondents' expert testified does not necessarily

reflect an auditory command hallucination. Police officers who interviewed him in April 1979, as part of their ongoing investigation of the Graham murder, and then in January 1980, when Maria identified him as her attacker, did not document any unusual behavior in their interactions with him. The lack of a psychotic illness manifest in March 1979 undermines both of the mental state defenses, as a prerequisite to both is an assertion of mental illness, and neither of Petitioner's experts suggested that a diagnosis of post-traumatic stress disorder (which does not appear to have been diagnosed by any of Hughes's treating mental health personnel) nor organic brain disorder alone would account for Hughes's actions. While the experts testified that schizophrenia develops over a prolonged period of time, the record contains no contemporaneous documentation of any symptoms of schizophrenia that Hughes experienced before March 1, 1979. Hughes's account that "something told him" to kill Graham was offered ten months after the event, and during an interrogation in which he was being pressed for a satisfactory explanation for his actions. His family's subsequent descriptions of Hughes talking to himself and appearing withdrawn at various points in his childhood is not borne out in the school records or the records relating to his adjudication for the 1976 rape of Dorothy. Those contentions are also belied by social service records from Hughes' time with his mother in California, which documented communication deficits in his siblings but not in him. We also consider it rather significant that Hughes was undergoing court-ordered psychiatric counseling beginning in January 1977, which terminated at the conclusion of the minimum one-year period presumably because the psychiatrist did not feel further counseling was needed. (*See* Pet'r Hrg Ex. D20 at 10-11 (documenting probationary sentence to psychiatric counseling of "at least one year,"

to terminate thereafter at discretion of counselor).)[35] Therefore, the record would appear to *rule out* any symptoms of schizophrenia in Hughes in January 1978, just 14 months before the Graham offenses.[36]

The manner in which Hughes's alleged insanity arose on March 1, 1979 would also have been potentially problematic had Tinari raised this defense, in that Pennsylvania precedents specifically held that neither insanity nor diminished capacity is established if the defendant merely lacked self-control or the ability to resist an impulse to perform a particular act. *See, e.g., Commonwealth v. Neill*, 67 A.2d 276, 269-70 (Pa. 1949) (differentiating legal insanity from "a mere temporary frenzy or emotional excitation"). *See also Commonwealth v. Weinstein*, 451 A.2d 1344, 1348 (Pa. 1982) (noting that evidence relating "to an illness which so distorts or confuses an individual's mental processes that he is unable to control his actions and thus is robbed of his freedom to adhere to the right and eschew the wrong" is not admissible as to insanity or diminished capacity, reiterating that Pennsylvania does not accept "irresistible impulse" test to prove insanity). Perhaps more damaging, had the defense asserted at trial that Hughes did not know that raping and killing Graham was wrong or that he did not know what he was doing, the door may well have been open for the jury to hear the very damaging details of Hughes's prior rape, of Dorothy in September 1976, two and a half years before the Graham murder. *See Commonwealth v. Thomas*, 282 A.2d 693

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[35] The record before us does not contain any reports from that period of counseling.

[36] Moreover, to the extent that Petitioner's experts relied on documentation of Hughes's mental decline while in pre-trial custody in state facilities in 1980 to support their opinion that the onset of schizophrenia dated to March 1, 1979, Respondents' expert offered the reasonable rebuttal that the prison setting, particularly for a younger individual who had not been housed there before and the fact that he was facing very serious charges, could alone account for a precipitous decline in one's mental health. (*See* N.T. 2/23/10 at 89.)

(Pa. 1971) (permitting expert witness to be cross-examined with data not in evidence when the materials relied upon are of the type reasonably relied upon by experts in the field). The prior rape established that Hughes was engaging in a pattern of taking young girls to abandoned houses, raping them, and either threatening to kill them if they told anyone of the rape or actually killing them. The fact that Hughes had been caught for the rape of Dorothy would further have been used to undermine his experts' opinions and suggest to the jury that when Hughes strangled Graham, he was not following a command hallucination that obliterated any sense that what he did was wrong but rather he was ensuring that *this* rape victim, who knew him and would have been able to identify him, did not report him to authorities. The Commonwealth would likely also have had license to introduce evidence that Hughes had given a statement to the police in which he admitted some contact with Maria in January 1981 but minimized what he did to her, admitting that he "just slapped her" (*see* Resp'ts Evid. Hrg. Ex. R6), which again would have been argued as evidence that Hughes knew, at the time he gave the statement just days after the assault, that his actions were wrong. Any contention that the defense might assert that Hughes killed Graham and set her body on fire only because "something told him to do it" and that the "something" constituted an auditory command hallucination that interfered with his ability to know right from wrong or to have formed the intent to kill would also have been belied by the fact that his confessions to the rapes of Dorothy and Maria provided no indication that he raped either of them or choked Maria until she was unconscious because either a "voice" or "something" "told him to do it."[37]

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[37] As Respondents point out, *see* Post-Hearing Brief at 54-56, the strategy that Tinari chose was to argue that the Commonwealth's case against Hughes was entirely the product of pressure on the police to solve a high-profile crime that had gone cold after 11 months. Tinari contended that the (continued...)

It is no enviable task to assess whether a jury was reasonably likely to have reached a different result in so complicated a case had certain evidence been heard and argument made in support of an insanity or diminished capacity defense. The Pennsylvania Supreme Court has noted, in a case with equivocal expert testimony, that a jury was "well justified" in rejecting a defendant's account in support of an insanity defense "that just for the few minutes required in which to perpetrate the killing he was mentally irresponsible and had no consciousness of what he was doing," where his actions immediately before and immediately after he committed the killing show "that he was in perfect possession of his senses[.]" *Commonwealth v. Heller*, 87 A.2d 287, 289 (Pa. 1952). *See also Commonwealth v. Mitchell*, 902 A.2d 430, 449-50 (Pa. 2006) (finding that Commonwealth presented sufficient evidence of specific intent to kill, despite expert psychiatric opinion that defendant suffered from diminished capacity, where he announced intention to kill beforehand and afterward discarded victim's clothes and murder weapon and attended previously-scheduled engagement to alleviate suspicion that he knew of victim's death); *id.* (noting that defendant's "articulate, coherent, and extremely detailed confession" evidenced specific intent to kill). Petitioner fails to convince us that there is a reasonable probability that the jury would have accepted an insanity or diminished capacity defense to the first-degree murder charge, and thus we cannot find Tinari to have performed deficiently in not presenting either defense to the jury. To the extent that any deficiencies on his part in the investigation of these defenses could be said to have been

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[37](...continued)
person who had been identified by twelve-year old Maria was someone with a low IQ and limited reading ability who could be easily affected by a long custodial interrogation to falsely confess. This approach did not open the door to damaging rebuttal evidence as much as would have been the case had the defense asserted insanity or diminished capacity.

"deficient" in a *Strickland* sense, we find that Petitioner has not established that there was a reasonable probability that he would not have been convicted of first-degree murder but for Tinari's adherence to an innocence defense. Accordingly, even considering the record as expanded as a result of the federal evidentiary hearing, we conclude that the state court's adjudication of this claim of ineffective assistance of counsel did not result in a decision that was contrary to or involved an unreasonable application of *Strickland.* Habeas relief under 28 U.S.C. § 2254 is not available as to this claim.

C. Trial as an adult

Hughes's third ground for relief is that he should not have been tried as an adult and that there is a reasonable probability that, were it not for the ineffective assistance of counsel during the transfer hearing of March 10-11, 1980, the court would have transferred his case to the juvenile court system and he would have been committed for mental health treatment rather than convicted of the Graham murder and sentenced to prison. (Pet. ¶¶ 157-60.) Respondents contend that Hughes was not entitled to a transfer to juvenile court and therefore that his attorney's conduct relating to the transfer request cannot give rise to a successful *Strickland* challenge. (Ans. at 35-36.) We consider the two components of this claim.[38]

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[38] Although Petitioner does not identify this as a *Strickland* claim — entitling this section "Petitioner Should Not Have Been Tried as an Adult" — any due process claim he might be asserting appears intertwined with a claim of ineffective assistance of counsel. *See, e.g.,* Pet. ¶ 157 ("Judge Ribner denied the transfer motion on March 11, 1980. This denial was fundamentally flawed by ineffective assistance of counsel."); *id.* ¶ 160 (asserting that "[i]f counsel had performed effectively and presented to the transfer court the overwhelming evidence of impaired mental health and need for mental health treatment, there is a reasonable probability that the court would have transferred the case").

1. Denial of transfer request

Pennsylvania's Juvenile Act provides for an alternative disposition for criminal cases involving youthful offenders.[39] At the time of the Graham offense, however, the statute provided that a juvenile accused of *murder* be adjudicated in the adult criminal court, which would have *discretion* to transfer the case to the juvenile system. *See Commonwealth v. Pyle*, 342 A.2d 101, 104 (Pa. 1975) (quoting Section 7 of Juvenile Act). While the statute did not establish any parameters for the court's exercise of its discretion to transfer jurisdiction of murder charges to the juvenile system, the Pennsylvania Supreme Court determined in *Commonwealth v. Pyle*, 342 A.2d 101 (Pa. 1975), that courts should consider criteria set forth in Subsection 28(a) of the legislation that allowed for the transfer of cases *from* juvenile court *to* the criminal court for offenders who were at least 14 years of age. *See also Commonwealth v. Kocher*, 602 A.2d 1308, 1311 (Pa. 1992) (describing history of Juvenile Act and noting that *Pyle* court held that Subsection 28(a) "provided the proper criteria for the criminal court to use when considering a petition for transfer of a murder case to juvenile court"). Pursuant to that section, a case should be adjudicated in the adult criminal court if: (1) the child was not amenable to treatment, supervision or rehabilitation as a juvenile through available facilities, (2) the child was not committable to an institution for the mentally retarded or mentally ill, and (3) the interests of the community required confinement or the case involved a crime punishable by greater than 3 years. *Pyle*, 342 A.2d at 105 n.5. While recognizing that the

[39] In a juvenile adjudicatory proceeding as opposed to criminal court, "the juvenile is shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of the adjudication against him in subsequent proceedings, and disqualification for public employment." *Commonwealth v. Pyle*, 342 A.2d 101, 105 n.9 (Pa. 1975) (internal quotation and citation omitted).

determinative factors in the "amenability" assessment are case-sensitive, the *Pyle* court suggested consideration of the following: (1) the offender's "personal make-up (E.g., mental capacity and maturity as determined by consideration of his home and school environmental situation, emotional attitude, and pattern of living)," (2) previous contacts with juvenile courts and/or law enforcement, and (3) the nature and circumstances of the crime ("E.g., inquiry into whether the killing was committed in an aggressive, violent or willful manner, whether the safety of the community requires lengthy incarceration, ..."). *Pyle*, 342 A.2d at 107.

In the case before the *Pyle* court, the 17-year-old defendant based his transfer request on his need for psychiatric treatment. The court noted that the second factor in the Subsection 28(a) analysis recognized that a "special reason ... for sparing the youth from adult prosecution and punishment" exists where there is "evidence of mental illness or retardation." *Pyle*, 342 A.2d at 106-07. However, despite evidence that defendant Pyle was "emotionally unstable" due to "deep-seated" problems, the court refused to transfer the case to juvenile court where there was insufficient evidence that the juvenile facilities would assure rehabilitation commensurate with the serious nature of the defendant's problems within the time constraints — that is, in the time until Pyle turned 21 years of age. *Id.* at 107.

When the Court of Common Pleas considered Hughes's transfer request in March 1980, the evidence pertaining to the issue of Hughes's need for and amenability to treatment in the juvenile system, including factors identified by the *Pyle* court as bearing on amenability, included: (1) Hughes's "prior contact" with the juvenile system for a sex offense, and (2) the nature of the offenses against Graham and Maria. *Hughes-II*, 865 A.2d at 777. While the transfer court was not presented with extensive testimony concerning Hughes's mental health history, his grandmother testified as

to the neglect he experienced throughout his childhood. *Id.* (*See also* N.T. 3/11/80 at 89-91 (testimony of grandmother).) Counsel Mead Spurio also commented that, "while his mental ability wasn't testified to, nevertheless there has been no showing of any brilliance here." (N.T. 3/11/80 at 94.) Hughes's case, however, presented a scenario like that of *Pyle*, in which it appeared that no facility in the juvenile system could ensure his rehabilitation within the limited time period in which he would remain subject to its jurisdiction given his age. *Hughes-II*, 865 A.2d at 777. (*See also, e.g.,* N.T. 3/10/80 at 21-29 & N.T. 3/11/80 at 80 (testimony concerning availability of secure facilities housing juveniles and viability of housing a then-18-year-old offender such as Hughes with younger offenders); N.T. 3/11/80 at 100 (Judge Ribner's comment that "if the facts as alleged by the district attorney are proved, then I find that the juvenile court system cannot handle in any way this defendant"). Therefore, the fact that Hughes may have been in need of mental health treatment would not trump all other considerations, particularly where it appeared that the purpose of the juvenile system could not be effectuated with this older defendant who represented a danger to the community. Given the similarities to the facts of the *Pyle* case upheld by the Pennsylvania Supreme Court a few years earlier, we cannot say that the transfer court's decision in this case to retain jurisdiction in the criminal court was an abuse of its discretion under the Juvenile Act that rises to the level of a constitutional violation.

2. Ineffective assistance of counsel with respect to transfer request

In order for this issue to give rise to a viable claim of attorney ineffectiveness, Hughes would have to show that his counsel unreasonably failed to present relevant evidence to the transfer court and that he would have received a more favorable outcome had his attorney not performed deficiently. Hughes has not presented us with a sufficient basis from which we could conclude that

his transfer request would have been granted even had the court received the proffered evidence regarding his mental illness. We note, as did the *Hughes-II* court, that the transfer court already was aware of Hughes's neglected childhood, if not any mental health diagnoses *per se*. What appeared to motivate the transfer court's decision, however, was the nature of the charges against Hughes and the fact that he had not demonstrated any rehabilitation from his prior offenses and encounters with the juvenile system. (N.T. 3/11/80 at 99-102.) The court also was persuaded by the fact that it appeared there was no placement for Hughes following an adjudication in the juvenile system in which the safety of the community could be ensured and in which Hughes could receive appropriate rehabilitation before being released within the three years that remained until he turned 21. As a result, the court found that "the juvenile court system that we have today is just totally inadequate to handle this type" of situation. (N.T. 3/11/80 at 102.) We do not believe that the introduction of further evidence regarding Hughes's mental illness, whether nascent or full-blown at the time of the transfer proceeding — had such evidence even been available in early March 1980 — would have altered this conclusion.

Hughes's counsel at the transfer hearing did not present all of the evidence that might have been available regarding Hughes's developing mental illness. But this judgment is much easier to make in hindsight than it would have seemed in March 1980, less than two months after his arrest. Even if this could have been deemed representation beneath the standard of care, it did not rise to a level on which it prejudiced Hughes. The transfer court's decision to retain his case in the criminal court was based on perceived inadequacies in the juvenile court system to handle someone who had committed the serious crimes of which Hughes stood accused. The precise nature of Hughes's mental illness did not bear on that issue and, we believe, would not have affected the transfer court's

analysis or determination. Therefore, we do not believe this claim would have given rise to any right to relief. The state court's decision denying this ineffectiveness claim was therefore not an unreasonable application of *Strickland*.

D. Claims concerning jury instructions

The final category of claims raised by Hughes concerns the jury instructions given during the guilt-phase of his trial. He contends that his due process rights were violated because: (1) the court's instruction regarding reasonable doubt employed language that lessened the Commonwealth's burden of proof (Pet. ¶ 165); (2) the instruction regarding the presumption of innocence erroneously suggested that the presumption could be overcome by only a preponderance of the evidence, rather than by evidence beyond a reasonable doubt, and that this error was compounded both by a later instruction suggesting that the jury's function was to "acquire ... a belief in what *probably* happened" as well as the prosecutor's argument that the jury could return a guilty verdict if it found Hughes was "more than likely guilty" (Pet. ¶¶ 166-67); and (3) the court commented that there were no charges against Hughes that were not attended by malice, which could have caused the jury to believe it was not free to find that malice had not been proven (Pet. ¶ 168). Respondents contend that these claims are procedurally defaulted, as they were not raised in their present form in state court. They further contend that the claims are meritless, as evidenced by the state court's rejection of the claims when raised in the context of ineffective assistance of counsel claims on PCRA review. (Ans. at 36-42.)

We first address whether we should review these claims in light of Respondents' assertion of procedural default. Hughes did not raise any of these claims on direct appeal but did so on PCRA review, without layering them as claims of ineffective assistance of counsel for failing to litigate the issue on direct appeal. *See* Initial Br. of Appellant, *Commonwealth v. Hughes*, Pa. S. Ct. No. 313

C.A.D. (E.D.), at 62-66 (Jan. 14, 2002) (section entitled "The Guilt Phase Instructions Violated Due Process"). For reasons not elucidated in the opinion, the state court construed these claims as ones of ineffective assistance of counsel for failing to object to various instructions by the trial court and in failing to raise these issues on appeal.[40] Given that Petitioner presented these claims to the Pennsylvania Supreme Court on PCRA review and that court did not state that they were defaulted, he has satisfied his obligation to have fairly presented to the state court the due process claims now before us.

Our analysis of the claims raised by Hughes in this portion of the petition is guided by a consideration of whether the allegedly faulty instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). It is not sufficient for the petitioner to establish merely that the instruction is "undesirable, erroneous, or even 'universally condemned.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Further, the allegedly improper instruction must be considered in the context of the entirety of the instructions and the entirety of the trial, not in isolation. *Id.* To the extent that a challenged instruction is ambiguous, we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. *Id.* & 72 n.4 (quoting and re-affirming *Boyde v. California*, 494 U.S. 370, 380 (1990)).

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[40] The *Hughes-II* opinion does not indicate that these claims were subject to dismissal on the grounds of waiver nor does it state that the claims could only be considered as layered ineffectiveness claims. Elsewhere in the opinion, however, the court refers to what had been a relaxed waiver standard for capital cases. *See, e.g., Hughes-II*, 865 A.2d at 815-17 (Castille, J., concurring and dissenting).

1. Reasonable doubt instruction

Petitioner's first claim of error points to the following portion of the jury instructions:

> A doubt, to be reasonable, must be one which fairly strikes a conscientious mind and *clouds the judgment*. However, it is not such a doubt as one might dig up, ferret up, or conjure up or summon up out of oblivion or out of the norm for the purpose of escaping the consequences of an unpleasant verdict, but it is a doubt which is reasonable, an honest and real doubt fairly and with intellectual honesty arising out of the evidence that was presented or, just as importantly, out of the lack or absence of evidence that was presented with respect to some part or element of a crime.
>
> A reasonable doubt is not merely any imagined or fanciful or passing fancy that may come into the mind of a juror. It must be a doubt arising from the evidence, which is *substantial*, well-founded, and based on human reason and common sense.
>
> A reasonable doubt such as would be taken notice of by a juror in deciding a case or a question or issue in the case is of the same nature as a doubt that would cause a reasonable man or woman, in the conduct of his or her affairs, in a matter of importance to himself or herself, to stop, hesitate, and seriously consider as to whether he should do a certain thing before finally acting.
>
> Further, a reasonable doubt is something different and *much more serious than a possible doubt.* All of us live day to day and have lived in the course of our lives on a day-to-day basis, and we all know from our common learning and experience that all matters of knowledge in human affairs entail a possible doubt. A possible doubt arises in any and all things. It is almost impossible to possess any human knowledge or to come to any conclusion to a certainty beyond a possible doubt.
>
> The Commonwealth is not required to prove its case beyond all doubt.

(N.T. 3/23/81 at 1875-76 (emphasizing language challenged by Petitioner).) Hughes contends that, by defining reasonable doubt as doubt that is "substantial" and that must "cloud the judgment," and that it must be "much more serious than a possible doubt," the court unconstitutionally lessened the Commonwealth's burden of proof. (Pet. ¶ 165.) We disagree.

The United States Supreme Court has identified some concerns with the use of the word "substantial" in relation to the concept of "reasonable doubt" to the extent that "substantial" might be understood to mean "that specified to a large degree." *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 19-20 (1994). The Court also appreciated, however, that the context of the instruction could remove any ambiguity and make it clear that the term "substantial" intended to convey that a doubt must be "not seeming or imaginary." *Id.* The Court in *Victor* found that the defendant's due process rights were not violated by an instruction that stated: "A reasonable doubt is an actual and substantial doubt ... as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." *Id.* We agree with the state court that the context of the sentence in which the word "substantial" was used in this case makes clear that the term "was designed to distinguish the concept of reasonable doubt from that of an imaginary or possible doubt." *Hughes-II*, 865 A.2d at 790 (referencing *Victor* and concluding that "counsel cannot be deemed ineffective for failing to challenge" this instruction on direct appeal).

When viewed in the context of the instruction on reasonable doubt as a whole,[41] we cannot

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[41] Prior to the portion of the instruction highlighted by Petitioner, the trial court also gave the following instruction to the jury:

> What is the meaning of that often articulated phrase, "beyond a reasonable doubt"? What is a reasonable doubt? Note initially that, although the Commonwealth has the burden of proving that the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt and to a mathematical degree of certainty, or that it must conform to a 100 percent standard of proof, nor must it demonstrate the complete and absolute impossibility of innocence.
>
> A reasonable doubt is such a doubt that would cause a reasonably prudent, careful, sensible person to pause, hesitate, and restrain himself or herself before acting upon a matter of highest importance in his or her own affairs.

(continued...)

say that the other language about which Petitioner also complains would have been reasonably likely to have caused the jury to apply a higher standard of doubt than that provided for by the Constitution. Moreover, when we view the challenged language in the context of the trial record as a whole and the quantity and quality of evidence against Hughes, we find it unlikely that any confusion regarding the reasonable doubt standard caused the jury to return a guilty verdict that it otherwise would not have returned.

2. Presumption of innocence instruction

Petitioner's second claim of error relates to the following portions of the jury instructions:

> The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt. If it meets that burden, the defendant is no longer presumed innocent, is no longer entitled to the presumption of innocence, and you must find him guilty.
>
> On the other hand, if the Commonwealth does not meet its burden, then you must find the defendant not guilty.
>
> Unless and until *outweighed by evidence to the contrary*, the law presumes that a defendant is innocent of crime or wrongdoing, and that the law has been obeyed. Therefore, if after a consideration of all of the evidence, the arguments of counsel, and the charge of this Court, the jury has a reasonable doubt of the defendant's guilt, it must find him not guilty.
>
> * * *
>
> It is for you and you alone to decide this case based on the evidence as it was presented from the witness stand and in accordance

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[41](...continued)

> A reasonable doubt is such a doubt as would cause a person to hesitate in arriving at a conclusion in a matter of importance to that person.
>
> Therefore, should you, after[] considering all of the evidence, formulate in your mind or have in your mind such a doubt as would cause you to hesitate in arriving at a conclusion in a matter of importance to yourselves, then it is your duty to give to the defendant the benefit of that reasonable doubt and find him not guilty.

(N.T. 3/23/81 at 1873-74.)

> with the instructions which I am now giving to you.
>
> * * *
>
> In this case there was a dispute about the facts of an earlier event or events. Specifically, what happened on that day in March, in and about 8:30 a.m., in the neighborhood of 1617 Olive Street, and what did occur in that third-floor bedroom, rear bedroom in 1617 Olive Street. That will be your job to determine.
>
> It is impossible for any fact-finder to acquire unquestionably accurate and unimpeachable or unattackable knowledge of what actually happened in this case. Instead, *all that you as jurors and as fact-finders can acquire is a belief in what probably happened* on the basis of the evidence presented here at trial. Accordingly, in its wisdom, the law prescribes or establishes a standard of proof beyond a reasonable doubt - - and I have explained that to you fully - - and the required standard of proof beyond a reasonable doubt is to assure, in the law's wisdom, the least margin of error in your fact-finding functions and duties.

(N.T. 3/23/81 at 1877, 1882-83 (emphasizing language challenged by Petitioner).) Hughes contends that these instructions "allow[ed] the presumption of innocence to be overcome by a preponderance of the evidence, rather than by evidence beyond a reasonable doubt" and that the jury would have believed that they need only determine "what probably happened" rather than determining "if the Commonwealth has proved its case beyond a reasonable doubt." (Pet. ¶ 166.) We disagree.

As the *Hughes-II* court recognized, Petitioner's focus on the phrase "outweighed by evidence to the contrary" ignores the consistent message of the court in the jury instructions that the burden of proof rested with the Commonwealth, that the burden of proof does not shift to the defendant, and that the standard of proof required of the Commonwealth as to each element of the offense was proof beyond a reasonable doubt. *See Hughes-II*, 865 A.2d at 790-91 & n.33 (finding instruction "adequate" and concluding that it thus "cannot serve as a predicate for a claim of deficient stewardship of counsel"). We find the instruction sufficiently clear that Hughes was entitled to a presumption of innocence — which the trial court described at length (*see*, *e.g.,* N.T. 3/23/81 at

1866-69, 1872-73) — and that this presumption could only be overcome by evidence beyond a reasonable doubt of his guilt. Moreover, the later instruction regarding the function of the jury as factfinder in a case of contested facts did not exacerbate any error regarding the presumption of innocence standard. This instruction did not contain such error as to undermine confidence in the outcome of the trial.

3. Malice instruction

Petitioner's final claim of error relates to the following portion of the jury instructions:

> The difference between manslaughter and all of the classes of murder is the presence of malice, as explained to you. If an unlawful killing is attended with malice, a term which I will define for you, it is murder. If it isn't attended with malice -- and we don't have any charges to any crimes that are not attended with malice in this case -- it is manslaughter.

(N.T. 3/23/81 at 1968.) Hughes contends that this instruction "served as a binding instruction to find malice when the jury should have been free to find or not find malice as it saw fit." (Pet. ¶ 168.)[42] We disagree.

This portion of the jury instructions followed upon the court's description of the various classifications of homicide, including the two classes of criminal homicide: murder and manslaughter. Judge Latrone explained that neither involuntary manslaughter nor voluntary manslaughter, which he briefly described, were issues in this case. He then provided the above instruction, which explained the legal distinction between the two types of manslaughter — which he had just advised the jurors were not the crimes of which Hughes stood accused in this case — and

[42] Although Hughes presented this issue in his brief to the Pennsylvania Supreme Court on PCRA review, the court's opinion does not appear to address this claim in any manner.

murder — which was one of the crimes of which Hughes stood accused. He then proceeded to define malice, which he explained was a component of each of the three degrees of murder. (N.T. 3/23/81 at 1966-68.) The court's description of the three types of murder further touched upon the required element of malice. (*See, e.g.,* N.T. 3/23/81 at 1978 ("Third-degree murder includes any unlawful killing of a human being with malice but with no intention to kill that exists or can reasonably and fully be inferred from the circumstances. Thus, if there is an unlawful killing where there is ... malice as I have defined it for you [] but if no intention to kill can be inferred ..., then the verdict should be guilty of murder in the third degree.").)

When read in context, the jury could not reasonably be believed to have understood the element of malice to have been decided by the court. Rather, it is apparent that in this portion of the instructions the court was merely setting forth how the charges in this case fell within the classification system for the various types of homicide. It was sufficiently clear that the jury was expected to consider whether malice had been proven as part of the murder charges contained in the information against Hughes. We do not believe that this instruction resulted in a violation of Hughes's due process rights as to warrant habeas relief.

V. CONCLUSION

We have considered the merits of each of the claims and sub-claims raised by Hughes in this petition. We determined that the state court's adjudication of the ineffective assistance of counsel claim without a more fully developed record as to counsel's investigation and decisionmaking regarding strategy and possible mental state defenses was unreasonable under *Strickland.* However, after considering the expanded record as to that issue, for the reasons set forth at length above, we are satisfied that the rejection of that claim by the Pennsylvania Supreme Court was neither contrary

to *Strickland* nor could it be said to be unreasonable, as even under a *de novo* review we do not find that Attorney Tinari provided deficient representation warranting habeas relief.

We also reject Hughes's contentions that his due process and Sixth Amendment right to the effective assistance of counsel were violated with respect to the state court's determination of his competency. We find that the disposition of that claim, and the many other claims that were adjudicated on the merits by the state court, were not contrary to any Supreme Court precedents nor did they result in objectively unreasonable applications of any high court precedents. We did not find any of the claims adjudicated on the merits by the state court to reflect clearly erroneous factual determinations as to Hughes's competency when he was tried in February and March 1981. As to the portions of those claims that did not receive state court merits review, we find that they do not give rise to relief as Hughes did not establish a deprivation of his due process right not to be tried while incompetent.

We further disagree with Petitioner's contention that the state court unreasonably applied either some generalized notion of due process notion or the *Strickland* standard with respect to his claim arising from his unsuccessful attempt to have his case heard in the juvenile system. Finally, we conclude that the state court did not unreasonably apply the United States Supreme Court's due process precedents when it denied relief as to the jury instruction challenges, and find that the claim that the state court failed to address did not entitle Hughes to relief under a *de novo* standard of review either.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district court judge is required to make a determination as to whether a certificate of appealability ("COA") should issue.

A COA should not issue unless the petitioner demonstrates that jurists of reason would find it to be debatable whether the petition states a valid claim for the denial of a constitutional right.

Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court to have erred in denying the present petition. Accordingly, we do not believe a COA should issue. Our Recommendation follows.

R E C O M M E N D A T I O N

AND NOW, this 30th day of April, 2012, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED**. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right or that reasonable jurists would find the correctness of the procedural aspects of this Recommendation debatable.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN HUGHES, Petitioner,	:	CIVIL ACTION
v.	:	
JEFFREY BEARD, et al., Respondents.	:	NO. 06-250

O R D E R

AND NOW, this day of , 2012, upon careful and independent consideration of the petition for writ of habeas corpus, the response, the record as expanded at the evidentiary hearing, the parties' briefs, the relevant portions of the state court record, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The petition for a writ of habeas corpus is DENIED; and

3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

R. BARCLARY SURRICK, J.